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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 93

IRVING FEINER, PETITIONER,

vs.

PEOPLE OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED MARCH 17, 1950.
CERTIORARI GRANTED MAY 29, 1950.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN COURT OF SPECIAL SESSIONS OF CITY OF SYRACUSE, NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

vs.

IRVING FEINER

Transcript of Hearing on Motion to Dismiss

PROCEEDINGS: May 3, 1949

ARGUMENT ON BEHALF OF DEFENDANT

Mr. Greenberg:

If the Court please, this is a motion to dismiss the charge of Disorderly Conduct on the grounds that the Information does not state facts sufficient to constitute the crime of Disorderly Conduct, and for the reason that there are very serious constitutional objections to the acts that are alleged in the Information. Previously a motion had been made for a Bill of Particulars and this bill of particulars was supplied—I believe the Court has a copy of that, setting forth the acts which the defendant is alleged to have committed.

The case arises out of a street meeting which was conducted by the American Labor party and the Young Progres-
[fol. 2] sives of America to publicize a meeting at which John Rogge was to speak; a permit had been granted by the Board of Education and on the very day of the meeting the permit was canceled, and in order to publicize the meeting and advise the people that the meeting place had been changed from Madison school to the Hotel Syracuse, this street meeting was used for the purpose of publicizing the affair. The defendant participated in this Street meeting and used a loud speaker which was attached to the automobile, and spoke at some length on the subject of the meeting, and when he had finished the Police who were present all during the course of the meeting, and were very much in evidence, proceeded to arrest him and charged him with Disorderly Conduct.

I would like to spend just a moment to state the reason why the defendant, and the organization inferentially, may be considered guilty of the crime because the defendant was speaking on behalf of the Organization.

The Court:

I don't think that would make the Organization liable. What is the name of the Organization?

[fol. 3] Mr. Greenberg:

The American Labor Party. Why its considered of such impertance——

The Court:

Well, why don't you now state what your motion is based on. Briefly tell me what you urge here as the basis for your motion. What I would like to do is to get it fixed in my mind just what objections you raised.

Mr. Greenberg:

I am going to ask your Honor to bear with me—I have outlined my points, and I think the Court will understand——

The Court:

You were asked to prepare a brief and submit it to the Court—that could simplify the whole motion here.

Mr. Greenberg:

I worked until mid-night last night and intended to type it up.

The Court:

What is the first point you raise?

[fol. 4] Mr. Greenberg:

I still would like the Court to understand that we are making this motion——

The Court:

How can I understand if you don't tell me the point.

Mr. Greenberg:

I would like to get to it in my own way because I have some very important points and would appreciate it if your Honor would bear with me.

The Court:

This looks like a simple motion to me. I shouldn't think it would be necessary to spend a great deal of time upon a preliminary motion. I would like very much to have you tell me what your main points are.

Mr. Greenberg:

I will get to them, never fear.

The Court:

All right, if you take too much time I will have to cut you short, of course, you have got to talk now, about this Information and Warrant.

Mr. Greenberg:

I am going to talk about it.

[fol. 5] The Court:

The point is simply what the defendant was doing or what he was saying at the time and place in question—that is, the place where he was using this Loud speaker apparatus, that is all there is to it— The fact that the meeting place had been changed or another meeting scheduled, or that someone else came from Washington or California or some other place to speak at this meeting, that, it seems to me, is a little besides the point. The point is, what was the defendant doing and saying at that particular time.

Mr. Greenberg:

It seems to me that in the absence of a Jury that I should be permitted to defend my arguments in a somewhat logical fashion—there's an important question of civil rights involved here.

The Court:

Well, that is academic.

Mr. Greenberg:

Its not academic when People are arrested for it.

The Court:

Well, if that was all there was to it he would not be [fol. 6] in Court today. I want you to talk about the charge; the violation this man is charged with, and whether or not at this stage of the proceedings, before we offer any evidence here, whether or not an act of Disorderly Conduct was committed; whether the acts set forth in the Information really took place. That is what I want you to talk about now, and I don't believe it would serve any purpose to talk about a hundred and one other things. Its simply what was the defendant saying and what was he doing at the time in question.

Mr. Greenberg:

If the Court would permit, I will get to that.

The Court:

Why don't you start at it now?

Mr. Greenberg:

The defendant is charged in the first instance with provoking and causing a breach of the peace by causing a crowd to congregate at the corner of Harrison and McBride Streets.

In the bill of particulars it is stated that the crowd consisted of in excess of 50 and approximately 60 to 75 per- [fol. 7] sons. I call the Court's attention to subdivision 4, of Section 722 of the Penal Law, wherein it is stated, any person who with intent to provoke a breach of peace, or by his actions, causes a crowd to collect, except when lawfully addressing such a crowd. Now the question arises under this Section—admitting that the defendant caused a crowd to congregate under subdivision 4, the question is whether or not he was lawfully ad-ressing such a crowd.

Under that Section or that part of the Information or that part of the Bill of Particulars, I maintain that there is no ordinance of the City of Syracuse that prevents the use of the Public Streets of the City of Syracuse for the purpose of conducting street meetings.

The cases from the United States Supreme Court down, have said that from time immemorial meetings may be conducted upon the Public street of cities. They have held invalid, ordinances seeking to abridge that right.

The only thing that the People have been able to produce in their bill of particulars and in their Information is that the defendant participated in a street meeting. There was nothing unlawful about that; nothing to indicate [fol. 8] that there was anything unlawful about the meeting itself. There was nothing unlawful about it and I challenge the District Attorney to produce cases showing it is unlawful per se to participate in or conduct a street meeting on the Streets of the City of Syracuse.

(Mr. Greenberg reads portion of Case of C.I.O. vs. Hague—United States 496.)

I maintain that these acts of the defendant in causing a crowd to congregate is not unlawful unless it may be shown that there was unlawful conduct at that meeting, and that by reason of the unlawful conduct the meeting itself was unlawful.

I ask the Court to bear that in mind, that is important because I have only a few seconds to spend on these points. The decision in this case must make as clear as possible whether people may hold Public meetings on the Streets of our cities.

The Court:

Yes, but Mr. Greenberg, the gist of the charge here is not that the meeting was held, but rather what was said and done by the defendant at this meeting.

[fol. 9] Mr. Greenberg:

No, the Information says, "in that he did then and there provoke and cause a breach of the Peace by causing a crowd to congregate at the corner of Harrison and South McBride Street, in the City of Syracuse, and did act in such a manner by talking over a loud speaker system as to annoy, disturb, interfere with and be offensive to others.

The Court:

The bill of particulars amplifies that charge by making it more specific.

Mr. Greenberg:

But your Honor, the point I make is that conducting a Public meeting as such is not unlawful.

The Court:

I understand that.

Mr. Greenberg:

The decision in this case must make clear that point.

(Mr. Greenberg quotes case of People vs. Smith—259 N. Y. Page 48.)

Now the Court of Appeals is very clear, that only under various circumstances where the crowd becomes disorderly [fol. 10] or there is likely to be a breach of the peace, only under those circumstances may certain actions be taken in connection thereto.

I would also like to point out the case of the People vs. Curran, 26 supplement 2, 291, a case well worth reading.

The Court:

Why don't you hand me a memorandum?

Mr. Greenberg:

I ask the Court to bear with me a moment.

In that case the Supreme Court rendered a decision that the right of peaceful assembly upon the public streets is a right which may not be denied or abridged by ordinances.

It is claimed I presume that one of the reasons why this meeting was unlawful, and I can only infer that from the information which says that the defendant did act in such a manner "by talking over a loud speaker, and thus, annoyed, disturbed and was offensive to others. The bill of particulars also states that; the defendant addressed the above crowd through a microphone with three loud speakers, creating loud and unnecessary sounds. I presume the [fol. 11] Information would indicate that the people are charging that it is a violation of law to use a loud speaker system.

The Court:

No, I don't understand that that is the charge.

Mr. Greenberg:

On the question of the use of the Loud speakers may I call the Court's attention to the case of the People vs. Saia, decided in 1948 by the United States Supreme Court.

The Court:

I think that is besides the point.

Mr. Greenberg:

I am prepared to go along on Your Honor's basis, but from my reading of the Information that is not the charge we have to meet. If this Court will tell me that the only charge we have to face is the language that the defendant used at this meeting, then I am prepared to proceed on that basis, but according to this Information we are being charged with the use of Loud Speakers.

The Court:

You are being charged with the manner in which it was used and the things that were said and done by the defendant.

[fol. 12] Mr. Greenberg:

The Information states that he did act in such a manner by talking over a loud speaker, so as to annoy, disturb and be offensive to others, and that the defendant did make insulting and derogatory remarks.

The Court:

Well, that is a little different than the point you have been talking about here.

Mr. Greenberg:

I would say certainly we are in agreement with the Court that that part of the Information and the Bill of Particulars which refers to the use of Loud speakers is besides the point because if the defendant is guilty of Disorderly Conduct by the use of insulting and derogatory language it makes no difference whether he used the loud speaker or not—but according to the Information he is specifically charged with using a loud speaker; and I think that reference should be stricken from the Information.

and we should proceed only as to the language that was used.

The Court:

Are you now making a motion to have something stricken from the Information?

[fol. 13] Mr. Greenberg:

Yes, I ask the Court to strike from the Information this reference to loud speakers being used.

The Court:

Motion denied.

Mr. Greenberg:

I ask that we have an opportunity to finish the arguments.

The Court:

Well, you just made a motion.

Mr. Greenberg:

I assume the Court would take this under advisement.

The Court:

I say whether the loud speaker system was used, or whether this language was used with a loud speaker, that, in and of itself is not controlling here. As stated in the Information, its the manner in which it is used; the things that were said and done with the use of the loud speaker at the time in question and at that particular place. I think I have made myself clear, and I deny your motion.

Mr. Greenberg:

If the Court please, now with reference to the language, [fol. 14] the Information charges that the defendant, in addition, did make insulting and derogatory remarks. In the Bill of particulars the defendant is charged with referring to the Syracuse City Administration as a stinking administration, and to Mayor Costello as "a Champagne sipping Bum," and to President Truman as a "Drunk," and to the American Legion as "Nazi Gestapo Agents."

I would like to take these one at a time, and I would like to state at the outset that I hold no brief for the use of this kind of language—I don't believe that any issues

concerning the People of Syracuse will be settled by any name calling by one side or the other.

I assure you that if anyone has suffered from the use of name calling it has been the minority groups, so that the defendant and the organization involved in this street meeting would be extremely happy if name calling were removed entirely from the area of Political discussion.

[fol. 15] The question is, however, whether or not the language, and we do not admit this language was used, but for the purpose of this motion we have to assume this language was used, whether such language can or should be the basis of such a charge; that is, the charge of Disorderly Conduct. It is charged that the defendant referred to the City Administration as a "Stinking Administration." I might say that there are very few administrations that have not, at some time or other been called names of this kind. If the defendant on the street corner called the Republican Administration a stinking administration, is that a crime? It seems to be the customary thing in Political discussions for one side to call the other side names of this sort. Mr. John Walsh at the City Hall, at a hearing called by the Common Council on the Housing situation, and in the presence of various members of the City administration said as follows: (and he was not arrested, and so I would like to know why this defendant is being charged with the use of language that is hardly as violent and derogatory as the language used by Mr. Walsh.

I quote from the Syracuse Herald Journal—April 5, 1949:

[fol. 16] "John Walsh, self-styled editor was threatened with eviction from the Hearing after he declared, "if this provision goes through the people will run the dirty politicians out at the next election." If we are going to put in jail everyone who speaks against a City administration I am afraid our jails are going to be awfully over-crowded. I would also like to refer your Honor to People vs. Curran, page 305, 291, supplement 2.

Are we going to decide that calling the City Administration a stinking administration is a violation of the law, but referring to them as "a bunch of crooks" is not. I believe that if this defendant is guilty then Mr. Walsh is also guilty in making the statements he did right in the

City Hall itself when every word was going to be reported in the press. Your Honor has been in Political life long enough to know that name calling in that fashion is not an unusual thing between members of opposing parties.

Mayor Costello it is charged, was called a "champagne sipping bum." I think we can concede that it is not offensive to accuse someone of drinking champagne, so we get down to the use of the word "bum." Now both Mayor Costello and Mayor Dwyer were called bums; apparently [fol. 17] the Syracuse Police Officers are much more sensitive to the good name of Mayor Costello than are the Police Officer- of New York City.

The Court:

Assuming that you are right in what you say in regard to the name-calling aimed at these men, there were other things that also have a bearing on this charge.

Mr. Greenberg:

Well, we have got to take one at a time.

The Court:

I know, but why not take all of these things collectively?

Mr. Greenberg:

I do not want to take up too much of the Court's time, but if your Honor will be a little patient with me.

(Mr. Greenberg quotes from the New York Times, March 12, 1949.)

The Court:

I remember that article in the paper.

Mr. Greenberg:

Well, if its not wrong down in New York it should not [fol. 18] be wrong here.

I think it is disrespectful to call the Mayor or the Governor or the President a bum, but whether its disrespectful or actionable is something different. No doubt calling-names such as these might be considered in bad taste, but hardly a cause for action of this kind.

The Court:

Well, I think you have covered your points rather fully.

Mr. Greenberg:

I would like to refer your Honor to the case of Shankrof vs. LaGuardia, 247 Appellate division.

The Court:

Well, you are going to hand me a memorandum?

Mr. Greenberg:

Yes, Then so far as characterizing the American Legion as Nazi Gestapo Agents——

The Court:

Well, we will place that in the same category—proceed with your motion.

Mr. Greenberg:

Well, in connection with this characterization of The [fol. 19] American Legion, I would like to refer your Honor to 297, New York 94—It is ground for libel to call anyone falsely a communist. If this defendant called the American Legion Nazi Gestapo Agents, why is it not grounds for arrest in respect to those who called the defendant a communist.

The Court:

We are trying this particular case here, not some other case. We are trying one defendant here on a certain statement of facts and on certain evidence that will be produced —do you expect that I ought to order everybody who called everybody else a name to be brought in here and tried because this defendant is being charged with Disorderly Conduct at a certain time and place as outlined in the Information.

Mr. Greenberg:

No, but I think the Court should order this defendant released because he did not commit any crime.

The Court:

Mr. Greenberg, we have covered that point very fully, now please proceed to the next point. Why don't you [fol. 20] talk about the items in the Bill of Particulars.

Mr. Greenberg:

In item C of the Bill of Particulars the people charge that the defendant refused to heed and observe reasonable police orders issued at the time and place mentioned—and that the defendant by reason of the crowd gathering, made it necessary for people to walk out into the highway.

The Court:

Tell me what your position is on that.

Mr. Greenberg:

Well I would take it to mean that some people as a result of this meeting were required to walk out into the highway rather than on the sidewalk—I say, that that, in and of itself would not constitute Disorderly Conduct. (Cites case of People vs. Nixon—248 N. Y. 182.) I have some other cases also that I would like to cite.

The Court:

Well, I will read those cases and check them over.

Mr. Greenberg:

Also the case of the People vs. Friedman.

[fol. 21] The Court:

All right, proceed to the next point.

Mr. Greenberg:

Well, I would like to finish this point if I may, in regard to whether people walked in the road or on the sidewalk because that doesn't constitute Disorderly Conduct.

The Court:

Well, I don't know what the People expect to prove; I don't know what their evidence is, but I presume it will be

based upon the facts in the Information and in the bill of particulars.

Mr. Greenberg:

The last point in the Bill of particulars is that the defendant did annoy, dist*rub* and was offensive to others by speaking to people assembled at said point (people who were mostly colored) and tending to excite and arouse and urging said people to rise up and arm and fight, and by the use of other language of the same general nature.

Now, first of all, the people are asking us to believe that this defendant in the full view of the Police Officers [fol. 22] made a statement of that kind——

The Court:

Well, that is the charge, and if the People can prove it that is one thing, and if they can't, well, that's another thing. We can't assume what the people are going to prove.

Mr. Greenberg:

I call the Court's attention to the People vs. Downes in which language of this kind was held to be not actionable under Section 722 of the Penal Law.

The Court:

Was that a Lower Court decision?

Mr. Greenberg:

Yes.

The Court:

Where did that arise?

Mr. Greenberg:

In New York City Magistrates. Also I would like to refer the Court to Misc. 142.

The Court:

In the cases you have cited here today, the decisions [fol. 23] were rendered after trial and not upon preliminary motions.

Mr. Greenberg:

Well I don't ask the Court to assume what the evidence will be—I should think we would have knowledge of that from the Information and the Bill of Particulars.

The Court:

Yes, but these cases have been decided after the proof was already in. In order to render a decision based on those cases it would be necessary to pre-suppose what the proof is going to be. Assuming that that charge by itself would not be sufficient to support the offense for which the defendant has been brought into Court; assuming that might be so, yet with all these other things taken collectively there might be enough to support the charge.

Now its plain here that as a result of all those things, and the People, I assume will urge that all those various things tended to create a breach of the peace, who can tell in advance [fol. 24] what the breach of the peace is going to be. I don't believe that the People will go any farther than they have here in setting forth the specific facts upon which the charge is based.

Mr. Greenberg:

Well, that is the substance of my argument. I can give your Honor a list of these cases the first thing in the morning. I can have this typed up, all you want is the citations is that right?

The Court:

Just a little notation emphasizing the points you claim each one of these cases support.

Mr. Greenberg:

All right, I will submit that.

The Court:

All right send them over this afternoon and I will render my decision tomorrow morning. I will reserve my decision until tomorrow morning on your motion.

ORDER OVERRULING MOTION TO DISMISS

May 4, 1949: Motion Denied.

[fol. 25] Reporter's Certificate to foregoing transcript omitted in printing.

[fols. 1-2] IN COURT OF SPECIAL SESSIONS OF CITY OF SYRACUSE, NEW YORK

ARRAIGNMENT PROCEEDINGS—March 10, 1949

Reading of the Charge:

Clerk:

You are charged by Dennis Flynn, Police Officer, that on the 8th day of March, 1949 in the City of Syracuse, New York, you did wilfully and unlawfully violate subdivision 2 of Section 722 of the Penal Law of the State of New York in that you did act in such a manner as to annoy, disturb, interfere with, obstruct and be offensive to others, by then and there provoking and causing a breach of the Peace, by causing a crowd to congregate at the corners of Harrison and S. McBride Streets in the City of Syracuse, New York, and did act in such a manner by talking over a loud speaker system as to annoy, disturb, interfere with and be offensive to others, and in addition, did make insulting and derogatory remarks concerning certain public officials in this community and elsewhere.

Q. Before any further proceedings are had, and at all stages of the proceedings against you, you are entitled to the aid of counsel.

[fol. 3] Mr. Greenberg:

I appear for the defendant.

Clerk:

You may plead guilty or not guilty. If you plead not guilty, you are entitled to trial—how do you plead?

Mr. Greenberg:

A. The defendant pleads not guilty. At this time I would like to reserve all rights, especially the right to make a motion addressed to the Information, and ask that the case be held until March 31st.

The Court:

That is too long an adjournment—I will set the case down for March 18th for disposition.

Mr. Greenberg:

May the defendant be paroled in my custody?

The Court:

No, under the circumstances I think he should put up bail—I will fix bail at one thousand dollars property or cash.

[fol. 4] In Court of Special Sessions of City of Syracuse, New York

The People of the State of New York

vs.

Irving Feiner

Transcript of Trial Proceedings—May 5, 1949

Charge: Disorderly Conduct.
Before: Judge William Bamerick.
For the People: Mr. Dan Kelly.
For the Defense: Mr. Sidney Greenberg.

Mr. Irving Blanchard, called to the stand by the People, sworn, testifies as follows:

Mr. Kelly:

Q. Officer Blanchard, you are a captain in the Syracuse Department of Police?

A. Yes.

Q. And have been for how many years?

A. Approximately fifteen years.

Q. Were you acting in such capacity on the night of March 8th, 1949?

[fol. 5] A. Yes.

Q. What were your duties that night?

A. Taking charge of the afternoon shift of the uniform force.

Q. Do you receive all incoming calls for aid or assistance sought from the police?

A. I receive a good many of them.

Q. I ask you, whether on that night you received a call relative to a gathering in the vicinity of S. McBride and Harrison Streets?

A. I did.

Mr. Greenberg:

I object to that as incompetent.

The Court:

Objection over-ruled.

Mr. Greenberg:

Exception.

Mr. Kelly:

Q. After having received that call what did you do?

Mr. Greenberg:

I object to that on the same ground.

[fol. 6] The Court:

Over-ruled.

A. I sent two officers in a car down there to investigate the report I received.

Q. What Officers did you send down there?

A. Officers Dennis Flynn and Roy Cook.

Q. You did not go there yourself?

A. No.

Mr. Kelly:

That is all.

Mr. Greenberg:

No cross-examination.

[fol. 7] DENNIS FLYNN, called to the stand by the People, sworn, testifies as follows:

Mr. Kelly:

Q. Mr. Flynn, you are a Police officer?
A. Yes.
Q. What's your rank?
A. Acting Sargeant.
Q. Were you acting in that capacity on the night of March 8, 1949?
A. I was.
Q. On that evening did you receive a detail from Captain Blanchard to go down to Harrison and south McBride Streets in the City of Syracuse?
A. Yes, I did.
Q. What time did you receive that detail?
A. Somewhere around six-thirty in the evening.
Q. Did you go down to that vicinity?
A. Yes.
Q. Alone?
A. Alone.

[fol. 8] Q. Did any other officer come there?
A. The other officer was there at the time.
Q. What officer was there?
A. Patrolman Roy Cook.
Q. Where were you when you received that call to go down to South McBride and Harrison Streets?
A. I was, I believe at the corner of South Avenue and Valley Drive.
Q. You received that call over the car radio?
A. Yes.
Q. When you got to that point at Harrison and S. McBride Streets, about what time was it you arrived there?
A. Approximately twelve or thirteen minutes later, after receiving the call.
Q. Tell us exactly what you observed when you got there.
A. When I arrived there on the northwest corner there was a crowd of approximately seventy-five people gathered, colored and white—— About forty feet back there was a car parked with a man standing on a large wooden box speaking through a hand microphone.

[fol. 9] The Court:

Q. Where was this box you speak of?

A. The car was facing south on McBride Street and the box was on the right hand side of the car.

Mr. Kelly:

Q. That would be out in the street from the car where he was speaking?

A. No, it would be between the sidewalk and the curb.

Q. You say the car was facing south?

A. Yes.

Q. The drivers side would be on the left hand?

A. The defendant was on the rider's side.

Q. Is the man in this Court room, who was on that box speaking?

A. Yes.

Q. Can you point him out?

A. Yes, that gentleman right there.

Q. Is that the defendant, Irving Feiner?

A. Yes.

Q. After you observed that, what did you do?

[fol. 10] A. Well, as I said before Patrolman Cook was already there when I arrived and I stood around next to him for some length of time listening to Mr. Feiner speaking over the microphone.

Q. You had no difficulty hearing what he said?

A. No.

Q. What did he say?

A. I can't give it to you in full——

Q. Tell us in substance what he said?

A. He was speaking in regard to John Rogge and the talk he was going to give later that night. He called Mayor Costello a champaign-sipping bum and President Truman a bum. He referred to the American Legion as Nazi Gestapo agents—he also said the fifteenth Ward was run by corrupt politicians and that horse rooms were operating.

Q. Did you observe the temperament of the crowd?

A. Yes.

Q. What did you observe about that?

Mr. Greenberg:

I object to that—the witness is not qualified.

[fol. 11] The Court:

Objection over-ruled. He's going to tell what he observed.

Mr. Greenberg:

Exception.

A. I observed that there was angry muttering throughout the crowd, and the crowd hampered the use of the sidewalk.

Mr. Greenberg:

I object to that as calling for a conclusion.

The Court:

I will take it. You can cross-examine him Mr. Greenberg. The objection is over-ruled.

Mr. Greenberg:

Exception.

Mr. Kelly:

Q. Where was this crowd in reference to the side-walk which is used by pedestrians?

A. The crowd was on the sidewalk.

Q. Were there any pedestrians making an effort to go up the street?

[fol. 12] A. Yes.

Mr. Greenberg:

I object to his leading the witness.

The Court:

I know its leading, but its such a simple matter by sustaining your objection and having the question asked in another way, the result is the same.

Mr. Kelly:

Q. Did you observe any pedestrians?

A. Yes.

Q. What were they doing?

A. Trying to use the walk, but they had to go out into the road because of the crowd.

Mr. Greenberg:

I object to thaf as calling for a conclusion and ask that it go out.

The Court:

Over-ruled.

Mr. Kelly:

Q. Were those pedestrians able to use the sidewalk?
A. No.

[fol. 13] Q. Was the walk obstructed?
A. Yes.
Q. Where did the pedestrians go?
A. Into the road.
Q. They were forced into the road because of the crowd?
A. Yes.
Q. Was there any vehicular traffic there?
A. Yes.
Q. On what street?
A. South McBride.
Q. When these pedestrians went out into the road, they were forced to use the highway reserved for vehicles?
A. Yes.
Q. Did you try to put the crowd back up on the street?
A. Yes.

Mr. Greenberg:

I object to that as leading.

The Court:

Yes, the question is leading.

[fol. 14] Mr. Kelly:

Q. What did you do in reference to the crowd?
A. I tried to get them up off the road.
Q. I ask you whether you mingled with the crowd?
A. Yes.
Q. What did you observe and hear as you mingled with the crowd?
A. I observed that there was pushing and shoving and I had trouble getting through some portion of the crowd—

I also heard angry muttering, especially when the defendant continued to speak after I requested him to stop.

Q. Were there any persons that expressed disapproval of what he was saying.

Mr. Greenberg:

I object to that if the Court please, its leading.

The Court:

Sustained.

Mr. Kelly:

Q. What if anything did the people say?

A. When Mr. Feiner stated that the negro people do not [fol. 15] have equal rights and should rise up and fight, one man came up and said to me, "if you don't get that "son of a bitch" off, I will go over and get him off there myself."

Mr. Greenberg:

I object to that as not binding on the defendant.

Mr. Kelly:

Q. Was the defendant right there on the soap box at the time?

A. Yes.

Q. That statement was made right in his presence?

A. Yes.

Mr. Greenberg:

May I have a ruling on my objection your Honor? I object to each of the answers given by the witness after I made my objection as not binding on the defendant, and I ask that all the questions asked subsequent to my objection be stricken out.

The Court:

Well, let me ask the witness a question.

Q. Where was the man who made that statement that you just testified to, with reference to the Speaker?

[fol. 16] A. Mr. Feiner was on the northwest corner there and the Gentleman who made that statement was on the northeast corner.

Q. Did he speak loud, or in just a conversational tone?

A. No, he was mad at the time.

The Court:

I will over-rule your objection because of the fact that it would not make any particular difference whether Mr. Feiner heard that statement or not—if the statement indicated what might be taking place in the crowd, whether the defendant heard every word that was said or understood every detail as to what might follow, that fact, that he did not know just exactly what everyone was saying and doing, at least insofar as that statement is concerned, I don't think the evidence is objectionable.

Mr. Kelly:

Q. Did you observe that there was unrest in the crowd?

Mr. Greenberg:

I object to that as leading.

A. Yes.

[fol. 17] The Court:

Well, he's already answered—but he's testified to that before—he said there was pushing and angry muttering. Objection is over-ruled.

Mr. Greenberg:

Exception.

Mr. Kelly:

Q. Were there any arguments among individuals in the crowd?

Mr. Greenberg:

Objection.

The Court:

Over-ruled.

Mr. Greenberg:

May I point out what I am trying to arrive at here. It may be that this witness, if permitted to tell his story in the usual way can tell all these things without being lead. Its highly improper for counsel to lead the witness—I think its highly irregular.

The Court:

All right, go ahead.

[fol. 18] Mr. Kelly:

Q. I think your testimony officer, was that the speaker was appealing to the colored people in particular?
A. Yes, that's right.
Q. And that he made a plea to them to arm themselves and fight.

Mr. Greenberg:

I object to that as leading—its highly irregular.

The Court:

He's asking if he has already testified to that. I will over-rule your objection.

Mr. Greenberg:

Exception. Let the stenographer read the question.

The Court:

Mr. Kelly, ask the officer if he said that.

Mr. Kelly:

Q. You did say that?
A. Yes.
Q. In what kind of voice did this defendant make that plea to the colored people?

[fol. 19] Mr. Greenberg:

I object to that as calling for a conclusion.

The Court:

No, I think he's perfectly within his rights in asking that question—there's nothing leading about that. Objection is over-ruled.

Mr. Greenberg:

Exception.

Mr. Kelly:

Q. Describe the voice the speaker used—was it low or high?

A. It was loud—high pitched.

Q. Tell us again what his words were in reference to this arming.

Mr. Greenberg:

I object to that as repetition.

The Court:

You objected to it a minute ago because it was improper in form—now for the purpose of clearing up the point I will let him answer the question.

Mr. Greenberg:

My objection was over-ruled previously.

[fol. 20] The Court:

He may answer the question.

A. He said the negroes don't have equal rights and they should rise up and fight for them.

Q. Were any remarks made by people in the crowd at that time?

A. Yes.

Q. And immediately following, what did you do?

A. At that time, when the gentleman came up and made the statement I testified to, I figured it had gone far enough, so I went over to Mr. Feiner.

Q. The person to whom you went was the defendant here?

A. Yes.

Q. When you got to him what did you say or do?

A. First I asked him to get down off the box and he ignored me and kept right on talking to the crowd.

Q. What was he saying.

A. He kept telling them to go to the Syracuse Hotel and hear John Rogge.

Q. Did he say anything more about arming and fighting at that time?

[fol. 21] A. No.

Q. How many times did you ask this man to get down off the box?

A. Once.

Q. How long did you wait after you asked him?

A. About a minute.

Q. And he kept on talking to the crowd?

A. Yes.

Q. And did he have a microphone he was talking through?

A. Yes, in his left hand.

Q. After you requested him to get down off the box and he did not, what did you do then?

A. I demanded that he get down.

Q. What did he do then?

A. He did not get down.

Q. He still refused to get down?

A. Yes.

Q. What was the condition of the crowd at that time?

A. They were all coming closer, and getting around my neck to see what was going to happen.

Q. Was the crowd noisy?

[fol. 22] A. No, quiet.

Q. When he did not get down what did you do?

A. I told him he was under arrest, and that he had to get down off the box.

Q. And when he finally got down, did you bring him in to the Police Station?

A. Yes, after he first told the crowd that the law had arrived and would take over.

Q. Tell us about those side-play remarks that were made.

A. When he finally did get down off the box, he did not put the microphone away, so that what was said by me and by him could be heard by the crowd—so he told them that the law had arrived and would take over.

Q. He still refused your request to cease speaking?

A. Yes.

Q. And you placed him under arrest?

A. That's right.

Q. And all this took place down here on the corner of S. McBride and Harrison Streets?

A. Yes.

Q. That locality is in the territorial limits of the City of Syracuse?

[fol. 23] A. Yes.

Q. So this disturbance took place in the City of Syracuse?

Mr. Greenberg:

I object to the characterization as a "disturbance," I think the facts speak for themselves.

Mr. Kelly:

Q. Was there a disturbance?

A. Yes.

Q. This truck was equipped with a loud speaker?

A. It was an automobile.

Q. With how many loud speakers?

A. Three.

Q. In what direction were the loud speakers facing?

A. On the roof, one was facing south and one was on an angle, a forty-five degree angle.

Q. Was that crowd congregated in front of any stores?

A. They were standing on the side of a drug store.

Q. There was a drug store, on the side of which this crowd was assembled?

A. Yes.

[fol. 24] Mr. Kelly:

Q. Did you observe people making an effort to get in or out of that drug store?

A. No, I did not.

Mr. Kelly:

No more questions.

[fol. 25] DENNIS FLYNN: cross-examination by Mr. Greenberg:

Mr. Greenberg:

Q. You say there were about seventy-five people on that corner?

A. Approximately seventy-five.

Q. Where were they located?

A. On the northwest corner of S. McBride and Harrison streets.

Q. All of them?

A. Yes.

Q. You say you got there sometime around six-thirty or so?

A. I don't recall the time exactly. I said approximately.

Q. Well, approximately six-thirty?

A. I arrived there approximately ten minutes after I received the call.

Q. Do you know when you got the call?

A. No, not off hand, my report would show it.

Q. Was the defendant speaking when you got there?

A. Yes.

[fol. 26] Q. You don't know how long he had been speaking when you got there?

A. No.

Q. How long had you remained there before you put the defendant under arrest?

A. Fifteen or twenty minutes.

Q. And was it dark?

A. Fairly dark, yes.

Q. It was night time?

A. Yes.

Q. And was it a cold night?

A. No.

Q. What was the weather on that day?

A. You mean the temperature?

Q. Yes.

A. I don't know.

Q. Well, was it a summer-like day or a winter-like day?

A. I already testified it wasn't cold.

Q. When you arrived at the corner of S. McBride and Harrison Streets, you came in a car?

[fol. 27] A. Yes.

Q. Where did you park your car?

A. On S. McBride Street, right on the side of Ben's Liquor store.

Q. Was there another car with an officer present at the time?

A. Yes.

Q. Had he arrived there before you?

A. Yes.

Q. Do you know how long before you he arrived?

A. No.

Q. Did you observe where his car was parked?

A. Yes, right by mine. In back of mine.

Q. You parked in front of him?

A. Yes.

Q. On the side of Ben's liquor store?

A. Yes, I was on that side of the street.

Q. Where was this other cop when you arrived?

A. He was in his car.

[fol. 28] Q. What did you do when you arrived there at the scene?

A. I went back and talked to Officer Cook to find out what was going on.

Q. You say you went back to talk to him—did you get into his car?

A. No.

Q. Where did you locate yourself in reference to Officer Cook's car?

A. I stood on the left side of his car—the driver's side.

Q. You had a clear view of everything that was going on there, did you?

A. Yes.

Q. And you had an opportunity to see the defendant speaking?

A. Yes.

Q. And you could see all of the people that were there?

A. I did not see them all face to face—but I saw the crowd there.

Q. Will you tell us something about the lighting conditions [fol. 29] on that corner—I understand there's a drug store there?

A. Yes.

Q. And do the windows of that drug store go back some ways; do they extend back a ways on South McBride Street?

A. No, there are no windows on the side, that I recall—only, I think a window in the back room there.

Q. So there are no windows, or no large windows on the McBride Street side?

A. No.

Q. Is there a window up above there?

A. I don't recall.

Mr. Kelly:

I object to these questions as having no bearing on this situation.

The Court:

Objection over-ruled.

Mr. Greenberg:

Q. So that from the entrance of this drug store which is [fol. 30] situated exactly on the corner, there is a brick wall, a solid brick wall, going all the way back to the end of the building?

A. That's correct.

Q. Where was the defendant's car parked, the car on which the microphone was located—where was that in reference to that brick wall?

A. It was just about opposite the side door.

Q. Is there a window there?

A. I don't recall that.

Q. Is there any glass in that door?

A. Yes.

Q. Any light coming out of that door?

A. Yes.

Q. What about the street lights on S. McBride Street—is there a street light near by?

A. I don't recall that either.

Q. You say the defendant was talking from a hand microphone?

[fol. 31] A. Yes.

Q. And he was standing on a box?

A. Yes, a large box.

Q. On the driver's side, did you say?

A. On the rider's side.

Q. The car was facing south?

A. Yes.

Q. Do you know how big that boy was—how tall it was?
A. About two feet I would say.
Q. Could you see the defendant from your position?
A. Yes.
Q. About how far away from the defendant were you?
A. Maybe twenty to twenty-five feet.
Q. From the time you arrived there at this other Officer's car and started talking with him, until the time that you made the arrest, had you moved your position at all?
A. Yes.
Q. In what way did you move?
A. I went in to use the phone at Ben's liquor store.
[fol. 32] Q. Was that for the purpose of calling Police headquarters?
A. Yes.
Q. Was that before you heard the statements or after?
A. After I heard them.
Q. And you went into the liquor store to call headquarters to find out what you should do about it?

Mr. Kelly: I object to that.
The Court: I will take it.

A. I heard some of the remarks before I used the phone—after I heard some of the remarks I called Police headquarters.
Q. How long had you been standing talking with the other officer before you used the phone?
A. Well, I did not talk to him all the time—I was listening to the defendant.
Q. But you continued to stand at the side of his car?
A. No.
[fol. 33] Q. Will you describe your movements from the time you left your automobile until you placed the defendant under arrest?
A. First I went over to talk to Officer Cook.
Q. How long did you talk to him?
A. I don't know.
Q. Did there come a time when you left officer Cook?
A. Yes.
Q. And where did you go?
A. That is when I went to use the telephone.
Q. Do you know how long you were in Ben's liquor store?
A. No.

Q. Give us your best judgment as to the time you were in there?

A. Oh, three or four minutes.

Q. Now give us your best judgment as to how long you stayed with Officer Cook before you went into Ben's liquor store?

A. All the time, with the exception of three or four minutes when I used the phone.

[fol. 34] Q. So with the exception of those three or four minutes you were with Officer Cook all of the time until you placed the defendant under arrest?

A. Yes.

Q. You say, Officer, that you observed people walking in the street?

A. Yes.

Q. How many people would you say, walked in the street while you were standing there?

A. I don't know.

Q. Give us your best judgment.

The Court:

Q. Was it a large number or a small number?

A. I can't say—I did not count them.

Q. Well, give us an estimate—approximately how many people did you see walking in the street?

A. Approximately ten people.

Mr. Greenberg:

Q. Suppose we take some of these people, were they walking on S. McBride or Harrison Streets?

[fol. 35] A. It was all on McBride Street.

Q. Were they walking on the west side or the east side of McBride Street?

A. On both sides.

Q. Both the east and the west sides?

A. Yes.

Q. Of those ten people, how many were walking on the west side?

A. I would say about half, but I don't know.

The Court:

Q. These people you say were walking down the roadway?

A. Yes, they had to—they could not use the sidewalk.

Mr. Greenberg:

Q. You were present there on the scene about fifteen or twenty minutes, with the exception of the time you went in the liquor store to use the phone?

A. Yes.

Q. Of these ten people, you testified some of them walked on the west side and some on the east side of South McBride Street?

[fol. 36] A. Yes.

The Court:

Q. On the roadway?

A. Yes.

Mr. Greenberg:

Q. You say that all told, there were ten people coming from either the northerly or southerly direction on McBride Street, that were required to walk in the road because they could not walk on the sidewalk?

A. Yes.

Q. And some had been walking on the east side and forced into the road from that side, and some on the west side who were forced into the road from that side?

A. Yes. Those on the east side attempted to cross over, and those from the west side were forced into the roadway. On the east side nothing was in the way.

Q. No one on the east side was forced into the road because of the crowd?

A. That is right.

Q. So all of these ten people had been walking on the west side who had been forced into the roadway?

[fol. 37] A. Yes, approximately ten on the West side.

Q. How many of those ten were coming from the north and how many were coming from the south?

A. I don't know.

Q. Can you give us your best judgment on that?

A. No, no more judgment than I gave you on the ten persons who were walking in the road. That's the best I can do. I can't recall in which direction or from which direction they were walking.

Q. That number ten is just an estimate?

A. That's right.

Q. So the ten might have been one?

A. No, there was more than one.

Q. Would you say more than two?

A. Yes.

Q. More than three?

A. Yes.

Q. More than four?

A. There was one family of four that came over, and the Gentleman included in that family was the one who made that statement that I testified about before.

[fol. 38] Q. It was a family of four that came over, and the man said something about stopping "that son of a bitch?"

A. Yes, it was the father that said that.

Q. What did that family consist of?

A. A mother and father and two boys.

Q. Where did they come from?

A. I don't know.

Q. How old were the boys?

A. Seven, eight or nine, somewhere about that age.

Q. Did you include those four people as part of the ten that were forced into the road?

A. They told me they were—they said they had to use the road.

Q. Because of the crowd on the West side of McBride St.?

A. Yes.

Q. You did not see them forced into the highway?

A. No.

Q. So that the first time you saw those four people was when they came over and the father made a complaint to you?

[fol. 39] A. That is right.

Q. When they came over and made that complaint did you do anything?

A. Yes, I went over and talked to Mr. Feiner.

Q. That is when you had the conversation with the defendant which resulted in his arrest?

A. Yes.

Q. Now we have four people whom you did not see forced into the highway?

The Court: You have already gone into that Mr. Greenberg—I don't think it serves any purpose to repeat it—I think his testimony in that respect is clear.

Mr. Greenberg:

Q. That means that six people were forced into the highway?

A. No, it still leaves ten—I testified it was approximately ten.

Q. You saw then, ten others besides these four?

A. Yes.

[fol. 40] Q. And you don't remember whether they came from a northerly or southerly direction?

A. I would say about half and half.

Q. Now, of these ten people that you say were forced into the highway, did you at any time see these people in the highway?

A. Yes.

Q. Where in the highway did you see them?

A. In the westerly portion of S. McBride St.

Q. Did you see them before they got into the highway?

A. In what direction were they traveling you mean?

Q. No, did you see them before they got into the highway?

A. I saw some of them.

Q. Some came from the north and some from the south?

A. Yes.

Q. Did any of these ten people come up to you and complain about the situation?

A. Some made remarks about the Police force not being able to handle the crowd.

Q. You say they were walking on the west side of McBride Street in the highway?

[fol. 41] A. Yes.

Q. Now, how long had you been there when you saw the first person forced out into the highway because he could not go through the crowd?

Mr. Kelly: I object to all this as immaterial.

The Court: Sustained.

Mr. Greenberg: Exception. I think the witness should be able to tell this story in some detail.

The Court: I have given you plenty of latitude now. He's covered all that. He said he did not count them. I will sustain the objection.

Mr. Greenberg: Exception.

Q. After you heard these remarks by these people did you move from your position at the car?

A. After I heard the remarks?

Q. Yes.

A. I had already moved before that —— I was standing on the westerly portion of the street.

[fol. 42] Q. So that these people were walking in the highway after you started to talk to Feiner?

A. No.

Q. Did they walk in the highway before you talked to the defendant?

A. Yes.

Q. And you said that you did not cross the street?

Mr. Kelly: I object. There's no testimony to that effect at all.

Mr. Greenberg: The witness has testified that he did not leave his position on the east side of the highway except to make a telephone call in a store located on the east side of the highway.

Mr. Flynn:

A. No, I did not say that—You asked me about Patrolman Cook—you asked me if I was with him.

Q. Well, did you go to the west side?

A. Yes.

[fol. 43] Q. How long before you placed the defendant under arrest did you go across the street?

A. I had been over there after I listened to some of the remarks ——. I used the telephone at Ben's liquor store, and then we crossed over to the west side and mingled with the crowd.

Q. Did you at any time ask the crowd to move away so that people could go through the crowd or pedestrians could walk through?

A. No.

Q. Did you at any time walk up to the defendant and tell him that traffic was being obstructed?

A. No.

Q. So that prior to the time you placed the defendant under arrest you gave no instructions either to the crowd or to the defendant or anyone else involved in this meeting?

A. That is right.

Q. You say that there were seventy-five people on that corner?

A. Yes.

[fol. 44] Q. Do you know what the distance is from this brick wall to the curb stone?

The Court: What brick wall?

Mr. Greenberg: The brick wall of the drug store.

A. I would say approximately fourteen feet.

Q. Did you ever measure it?

A. No.

Q. They were within the terminative point of that drug store?

A. Yes.

Q. And in a southerly direction how far did the crowd extend?

[fol. 45] A. Maybe almost to the doorway of the drug store.

Q. How much of a distance would you say that was?

A. From where to where?

Q. From the entrance to the Building on S. McBride Street.

A. Maybe thirty feet, that is just a guess.

Q. So that these seventy-five people were congregated in an area approximately thirty by fourteen feet?

The Court: That is what he said.

Mr. Greenberg:

Q. You say you mingled with the crowd, Officer.

A. Yes.

Q. During the time you were on the west side of McBride Street, did you have any difficulty walking back and forth?

A. Yes, in portions of that area.

Q. Did you ask anyone to get out of the way so you could get through?

A. Yes.

Q. Did anyone refuse?

[fol. 46] A. Some of them I had to touch on the arm to get them out of the way.

Q. And they did get out of the way?

A. Yes.

Q. From your observations while mingling with the crowd, are you prepared to state that there wasn't room enough for people to walk back and forth.

A. If they wanted to push around, yes, then there was room.

Mr. Greenberg: I object to that as not responsive—ask that it go out.

The Court: No, I will let it stand—— He said there was room if you wanted to push around. He's answered your question.

Mr. Greenberg:

Q. How many people did you see walk in the highway while you were mingling with the crowd?

Mr. Kelly: I object to that as repetition.

[fol. 47] The Court: I will let him answer if he knows. I don't think he measured things with that exactitude which would permit him to tell now. I think anyway, that you have covered that at great length.

Mr. Greenberg: Well, I want to get as complete a story as I can.

The Court: I want you to get a complete story, but I think we are wasting time with all this repetition.

Mr. Greenberg:

Q. While mingling with the crowd did your count the People?

A. No.

Mr. Kelly: I object to that—he said several times he did not count them.

Mr. Greenberg:

Q. That was after you made your telephone call to Police headquarters?

A. Yes.

[fol. 48] Q. And you knew at that time that you were under instructions to arrest anyone if something happened in violation of the law?

Mr. Kelly: I object to that—— Its irrelevant.

The Court: There's no evidence that they were given any instructions.

Mr. Greenberg: This is cross-examination if the Court please.

The Court: Yes, but you asked him about instructions. He hasn't testified to any. Objection is sustained.

Mr. Greenberg:

Q. Did this crowd of seventy-five people remain the same all during the time you were there?

A. No.

Q. Did the crowd increase or decrease?

A. It increased a little.

Q. The maximum number was seventy-five?

A. Yes.

[fol. 49] Q. Could it have been less?

A. It could have been more.

Q. Your best judgment is that it was seventy-five?

A. Yes sir.

Q. You had a pretty good view of this car from which the defendant was speaking?

A. Yes.

Q. And you say that there were three horns on the car?

A. Yes.

Q. Where were they located?

A. On the roof of the car.

The Court: Three outlets?

A. Yes.

Mr. Greenberg:

Q. In what direction were they facing?

A. The center one was facing south, and the other two were, one would be southwest and the other one southeast.

Q. Again, how many do you say there were?

[fol. 50] A. Three I would say.

Q. As a matter of fact weren't there only two?

A. I believe there was three.

Q. Did you see three speakers on that car?

A. Yes.

Q. Three loud speakers on the roof of the car?

A. Yes.

Q. Now with reference to the language that the defendant was using; this language I believe you testified, was used by the defendant prior to the time you made your phone call to Police headquarters?

A. Yes.

Q. You say that the defendant made reference to Mayor Costello?

A. Yes.

Q. Will you tell us in what connection the defendant brought Mayor Costello into his talk?

A. He did not seem to have any connection to bring names in his speech—he just seemed to bring anyone in it.

Q. I am asking you in relation to what subject was Mayor [fol. 51] Costello brought into the defendant's speech?

Mr. Kelly: I object—he said he didn't know.

The Court: He said he did not seen any connection.

Mr. Greenberg: That "he did not see any connection," is not the question.

The Court: Well, if he said he did not see any, I don't know of any better answer. I think the witness gave a fair answer.

Mr. Greenberg:

Q. What did the defendant say with reference to Mayor Costello?

A. He said he was a "champaign- sipping bum", and that he would not speak for the negro people, and he would not have him speak for them.

Q. Did he talk about the housing situation?

A. Yes.

Q. Did he talk about the rights of the negro people?, [fol. 52] A. Yes.

Q. And you are definitely clear that he called Mayor Costello a Champaign- sipping bum?

A. Yes.

Q. Did he mention the fact that Mayor Costello had been down to New Orleans?

A. I don't remember that.

Q. Didn't he say that Mayor Costello had been down to New Orleans drinking champaign-?

A. I did not hear that.

Q. Did you take any notes on this speech?

A. No.

Q. So that everything you testified to is from memory?

A. Yes.

Q. You say he talked about President Truman also?

A. Yes.

Q. He called him a name? Is that what you heard?

A. Yes.

Q. Officer, after you went across the street to the west [fol. 53] side of the highway and mingled with the crowd, did you go back to your car again before you made the arrest?

A. I don't remember that.

Q. As a matter of fact the only trip you made across the street to the west side of the highway was for the purpose of arresting the defendant, isn't that true?

A. No.

Q. How long did you mingle with the crowd before you arrested him?

Mr. Kelly: I object if the Court please—he's already covered that.

The Court: Yes, I wish, Mr. Greenberg, that you would complete your examination on any particular point and not keep going back and repeating. I think you have covered all that. I don't see any purpose served by repeating all the while.

Mr. Greenberg:

Q. You say you heard angry muttering?

[fol. 54] A. Yes.

Q. Will you describe that? What did that consist of?

A. Well, some of the remarks were for and some against Mr. Feiner.

Q. Did anyone do anything besides mutter?

A. Some of the crowd were pushing and shoving at that stage, but not to excess.

Q. You did not regard it as a disturbance?

A. Not at the time, but we stepped in to prevent it from resulting in a fight. After all there was angry muttering and pushing.

Q. When you got up to Feiner to make the arrest the crowd began to push in—is that so?

A. Yes.

Q. And is that when the pushing took place?

A. They pushed before that too.

Q. And the muttering you heard, you say was both for and against the speaker?

A. Yes.

Q. You say that the defendant said to rise up in arms and fight?

[fol. 55] A. Yes, he said fight for your rights.

Q. Did he at any time say rise up and arm?

A. He said, "in arms."

Q. But you never got the impression that he was sending anyone home for weapons?

A. I got an impression and I took action on it, that is all that was necessary.

The Court:

Q. What impression did you get?

A. That he was trying to arouse the negro people against the whites.

Mr. Greenberg:

Q. Did he at any time make a statement against the white people as such?

A. Except when he said, you negroes don't have equal rights.

Q. Did he at any time ask the negro people to take action against the white people as such?

A. No, I did not hear him ask anything like that.

Q. He was talking about Mayor Costello and the City administration?

[fol. 56] A. Yes, and all other officials.

Q. Well, you say there came a time when you went over to arrest the defendant?

A. Yes.

Q. Now, was that the first time you had approached the defendant?

A. Yes.

Q. And you went over to him for the purpose of arresting him?

A. No, I did not.

Q. What was your purpose?

A. To get him to break the concregation up—that is the reason.

Q. To stop the meeting?

A. Yes.

Q. What was the first thing you said to him?

A. I said, "will you get down off the box?" And he just looked, and kept right on talking to the crowd.

Q. Did you then make another statement to him?

A. Yes, after I waited a little while.

[fol. 57] Q. What did you say next to the defendant?

A. I told him to get off the box, and he still did not get down—then I demanded that he get down, and he said, the law has arrived—he said that through the microphone: "the law has arrived, and I suppose they will take over now."

Q. Did he get down off the box?

A. Yes.

Q. Did you tell him he was under arrest?

A. Yes.

Q. What did the defendant say to that?

A. He asked what he was under arrest for; and I told him for unlawful assembly—then I changed my mind and told him it was for Disorderly Conduct.

A. And the defendant raised no objection?

A. No.

Q. You took him to the Police Station?

A. Officer Cook did.

Q. You say you asked him three times to get down off the box?

[fol. 58] A. I asked him to get down once, I told him to get down the second time and demanded the third time.

Q. The third time he got off the box?

A. Yes.

Q. How long a time elapsed from the first time you asked him to get off the box until you arrested him?

A. A couple of minutes.

Q. From the time you first approached him until you placed him under arrest?

A. Yes.

Q. Prior to that time you had given no instructions as to the conduct of the meeting?

A. No.

Q. Did you hear the defendant say to the people, or ask the people to go down to the Hotel Syracuse to listen to John Rogge, and to go down there arm in arm?

A. No.

Q. You did not hear that?
A. No.

Mr. Greenberg: That is all.

[fol. 59] Mr. Kelly:

Q. When you heard this man say rise up in arms and fight for your rights, you knew what "Arms" were?
A. Yes.
Q. And the general impressions you got was fire arms?
A. It could have been.

Mr. Greenberg: I object to that—its calling for a conclusion.
The Court: Yes, I think he should tell with more definiteness what his impression was.

Mr. Kelly:

Q. What is your impression when you speak of "Arms", or at that time, did you feel that real trouble was in the air?
A. Yes.

Mr. Greenberg: I object to that on the same grounds.
The Court: Objection sustained.

Mr. Kelly:

Q. Well, that is the time you did go over and ask this [fol. 60] man to cease his harangue to the crowd?
A. Yes.
Q. And you had to repeat your request several times and finally had to take him into custody in order to get him to desist?
A. Yes.

Mr. Greenberg:

Q. When you approached the defendant, you did not go over with the idea of arresting him?
A. That is correct.
Q. And this was after you heard him make all these statements you testified to?
A. Yes.
Q. And after the people had been forced into the highway?

A. Yes.
Q. And after you counted three speakers on the truck?
A. Yes.
Q. And it was after you estimated the crowd at 75 people?
A. Yes.

[fol. 61] Mr. Kelly: All these questions are objected to—He's going over and over the same things again.

The Court: Sustained, you can't start all over again.

Mr. Greenberg: This is re-cross examination.

The Court: Yes, but you can't start all over from the beginning again—If you have any questions bearing on the subjects Mr. Kelly has asked about, all right. But you can't start from the beginning again now.

Mr. Greenberg:

Q. Are you prepared to state that if the defendant had gotten off the box immediately upon your request, you would not have arrested him?

Mr. Kelly: I object to that question—it calls for an answer based on things not proven.

The Court: You have gone all over that before.

[fol. 62] Mr. Greenberg: I want to marshall all the evidence I can.

The Court: You have already done a good job on that.

Mr. Greenberg: I have one final question.

Q. When you approached the defendant with the intention of only asking him to desist, and not arrest him, this was after the man with the family of four, came over and told you to stop Feiner?
A. Yes.
Q. And it was after you had heard the angry muttering?
A. Yes.

Mr. Greenberg: That is all.

[fol. 63] Roy Cook, called to the stand by the People; sworn, testifies as follows:

Mr. Kelly:

Q. Your full name is Roy R. Cook?
A. Yes.

Q. You are a police officer?

A. Yes.

Q. How long have you been a police officer?

A. One year May 1st.

Q. And you were acting as a Police Officer on the 8th day of March, 1949?

A. That is right.

Q. Did there come a time on that date when you received a detail to go down to the intersection of Harrison and S. McBride Streets?

A. Yes.

Q. Now, Harrison and McBride, those streets are both located in the City of Syracuse?

A. Yes.

Q. What were you- duties on that night?

[fol. 64] A. We received a complaint of a gathering.

Q. No-, what were your general duties that night?

A. I was on patrol duty.

Q. About what time of day or night did you receive the call to go to the intersection of Harrison and S. McBride Streets?

A. I think it was around six-thirty.

Q. Where were you at that time Officer?

A. I think I was at Genesee and Townsend, I am not sure.

Q. What time did you get down there?

A. Maybe three or four minutes after I received the call.

Q. And you went to the vicinity of Harrison and south McBride Streets?

A. Yes.

Q. Tell us just what you observed when you got to that location?

A. I observed quite a crowd congregated on the corner of S. McBride and Harrison Street. They were on McBride Street, just north of Harrison.

[fol. 65] Q. How large a crowd would you say that was?

A. About seventy-five or eighty people.

Q. Where was the crowd in reference to the sidewalk or roadway?

A. They were on S. McBride Street, on the west side of the sidewalk, and between the sidewalk and the curb.

Q. Was there anything else there besides people?

A. There was a car there with loud speakers.

Q. Where was that located?

A. About forty-five feet north of the corner of Harrison Street, on the west side of McBride Street.

Q. And facing in what direction?

A. South.

Q. Was that car equipped with a loud speaking device?

A. Yes, it had a public address system on the top of it.

Q. Did you observe anyone else there in connection with that car?

A. Yes, Mr. Feiner.

Q. The defendant here?

[fol. 66] A. Yes.

Q. Where was he?

A. He was standing on a large box on the right hand side of the car.

Q. Between the car and the sidewalk?

A. Yes.

Q. What was he doing?

A. He was speaking through this public address system.

Q. And was he speaking in a loud or a low tone of voice?

A. It seemed quite loud to me at the time.

Q. When you pulled up there, tell we just what you did first?

A. We both received a call, Officer Flynn and myself—I arrived at the scene first, so I sat and waited for the other car to come.

Q. Did the other car subsequently arrive there?

A. Yes.

Q. That was the car in which Officer Flynn was?

A. Yes.

Q. When Officer Flynn arrived what did you observe?

[fol. 67] A. Well, as I say I waited for the other car to come, and when Denny arrived he came over and stood by the door of ~~my~~ car and we listened to the speaker.

Q. Tell us what you heard—what was said by this speaker?

A. He was making remarks about certain people, certain public officials. He called Mayor Costello "a champaign-sipping bum" and he said the negroes did not have any rights. He called President Truman a bum and he told the negroes to rise up and fight for their rights.

Q. Did you remain in your car all the time you were there?

A. No, we did go over across the road later on.

Q. Did there come a time when you got out of your car?
A. Yes.
Q. And did you mix with this crowd?
A. Yes.
Q. Did you observe whether there were people passing north or south on McBride Street—using that thoroughfare or the sidewalk?
A. They could not use the sidewalk.
[fol. 68] Q. What did you observe in reference to the pedestrians going north and south at that point?
A. They had to walk around into the road—they could not pass on the sidewalk.
Q. When they went out into the road did that bring them into the travel portion of the highway used for vehicular traffic?
A. Yes.
Q. What if anything did you do relative to trying to make it possible for the people to go up and down the sidewalk?
A. We did not do anything at the time.
Q. You say you did mingle with the crowd?
A. Yes.

The Court:

Q. Is McBride Street a street that is traversed by pretty heavy automobile travel?
A. Yes, pretty heavy.

Mr. Kelly:

Q. This was around the supper hour?
[fol. 69] A. Yes.
Q. I ask you whether the street was heavily traveled that night?
A. I don't recall that.
Q. Was there a normal flow of traffic through it?

Mr. Greenberg: I object to it—he said he did not recall.

Mr. Kelly:

Q. Well, what do you remember about the traffic?

The Court:

Q. Tell what you did observe about the traffic.
A. I observed there was traffic there, yes.

Q. Was the volume of traffic large or small?

A. As I recall, it was not heavy.

Q. Do you recall anything else about the traffic situation that night?

A. Well, as I drove on south McBride St. and went past this crowd, I had to slow down pretty near to a stop at that point.

Mr. Kelly:

Q. When you came to that point was the street obstructed by pedestrians in the street?

[fol. 70] A. Yes.

Q. When you slowed down did you give any signal?

A. I tooted the horn a couple of times.

Q. You say you did mingle with the crowd that was assembled at this point?

A. Yes. We walked through there.

Q. What did you observe as to the attitude of that crowd?

A. They were kind of restless.

Q. What were they doing?

A. They were kind of more or less conversing about the speech Mr. Feiner was making.

Q. Any arguments going on?

Mr. Greenberg: I object to that as leading.

The Court: I will take it.

Mr. Greenberg: Exception.

Mr. Kelly:

Q. What was going on?

[fol. 71] A. Some were calm and some were not—they were discussing the speech pro and con.

Q. Any disorder there?

Mr. Greenberg: I object to that as calling for a conclusion.

The Court: I will let him answer.

A. Not that I know of.

Mr. Kelly:

Q. Tell us just what the crowd was doing?

A. Milling around back and forth—and a couple of times I heard someone say they did not see why they had to put up with that kind of stuff in the neighborhood.

Q. What happened to the pedestrians on the street?

A. They had to go around in the road—they could not get by on the sidewalk.

Q. Now you say the defendant made remarks about different City officials and Federal officials—were there any other remarks made by anyone?

Mr. Greenberg: I object, if he's going to confine this to the defendant, all right.

[fol. 72] The Court: I will let him answer that question and see what the next question is.

A. There was a fellow came by and Denny was talking to him—we were listening to the speaker at the time.

Q. What did he say?

A. He said, "if you don't take that son of a bitch off there, I will take him off myself."

Q. What was the general attitude of the crowd at that time?

A. They were getting to the point where they would be unruly.

Mr. Greenberg: I object to that as not binding on the defendant.

The Court: Yes, he ought to be more specific than that. I will sustain the objection.

Mr. Kelly:

Q. About the time that remark was made what was the crowd doing then?

A. They were listening to the speaker.

[fol. 73] Q. What else were they doing?

A. I don't understand what you mean.

Q. Were they moving about or jostling or disturbing any body?

Mr. Greenberg: Now I object to that if the Court please that question is highly improper and leading.

The Court: Well, I think Mr. Kelly was merely trying to make himself clear—the witness said he did not know what the first question meant. I will over-rule your objection.

A. They were obstructing the sidewalk.

Mr. Greenberg: I object to it as calling for a conclusion.

The Court: I will let it stand.

Mr. Greenberg: Exception.

Mr. Kelly:

Q. Did there come a time when you or the other officer addressed yourself to this defendant here?

[fol. 74] A. Yes.

Q. Was it you that talked to the defendant or was it Officer Dennis Flynn?

A. Flynn.

Q. Were you with him at that time?

A. Yes.

Q. Tell us just what officer Flynn said to the defendant?

A. He asked him to get down off the box.

Q. What did Feiner do when Flynn asked him to get down off the box?

A. He kept right on talking.

Q. What did he keep talking about?

A. About everything in general—they were advertising some kind of meeting at the Hotel Syracuse.

The Court:

Q. Did he get off the box?

A. No.

Q. Did Officer Flynn ask him more than once to get down?

A. Yes. He told him to get down the second time.

[fol. 75] Mr. Kelly:

Q. Did he get down off the box then?

A. No.

Q. Did he tell him his speech was disturbing the crowd?

A. I don't recall that. I know Feiner made some reference to the law arriving at that time.

Q. Did he still continue to speak?

A. Yes.

Q. Then what did Officer Flynn do?

A. He demanded that Feiner get down off the box.

Q. And did he finally get off or was he taken off?

A. He got off.

The Court:

Q. The Officer did not pull him off?

A. He reached up to grab him, and then Feiner stepped off the box.

Mr. Kelly:

Q. Continuing to talk into the microphone?

A. Yes.

Q. What did he say at that time?

[fol. 76] A. He said, the law will take over now, or something to that effect.

Q. Were you present when something was said in reference to arms?

A. Yes.

Mr. Greenberg: I object to that as leading.

The Court: Objection is sustained to that question what else was said officer, that you can recall?

A. I know he said the negroes should rise up in arms and fight for their rights.

Mr. Kelly:

Q. That statement was made by the defendant, Feiner?

A. Yes.

Q. Was that the time you and Officer Flynn went over to talk to the defendant?

A. It was shortly after that.

Q. Did you notice the attitude of the crowd after that statement was made?

A. Yes, they seemed to mill around a little then.

Q. Were they as well behaved after that remark as they were before?

[fol. 77] Mr. Greenberg: I object to that.

The Court: Over-ruled.

Mr. Greenberg: Exception.

A. It stirred up a little excitement.

Mr. Kelly: Then you went over with your fellow-officer and got the defendant off the box?

A. Shortly after that, yes.

Mr. Kelly: That is all.

[fol. 78] Roy Cook:

Cross-examination.

By Mr. Greenberg:

Q. Mr. Cook, you say you got instructions from headquarters to proceed to the corner of S. McBride and Harrison Streets on the night of March 8th?

A. Yes.

Q. When you arrived there what did you do if anything?

A. I drove south and went past Harrison Street, then I turned around in a drive-way on McBride Street and drove over and parked on the east side of the street.

Q. Where in reference to the corner?

A. It was north of the corner, maybe twenty feet or so.

Q. So you were about twenty feet south of the Feiner car?

A. I don't recall just how far from his car.

The Court:

Q. Did you park on the same side of the street?

A. Yes.

Q. You parked your car on the same side of the street?

A. No, on the opposite side.

Q. Across from where the defendant, Feiner, was speaking?

A. Yes.

[fol. 79] Q. And some twenty feet from the corner?

A. Yes, twenty to twenty-five feet.

Q. How far was the defendant from the corner there?

A. About forty or forty-five feet.

Mr. Greenberg:

Q. Did you remain in your car?

A. Yes, for a while.

Q. When you arrived there was Feiner already speaking?

A. Yes.

Q. How long did you remain in your car at that time?

A. I was in the car up until the time we went across the road.

Q. When you went across the road, did you go back to your car again before Feiner was arrested?

A. No, I don't believe I did.

Q. So that you made one trip across the street from the time you first got there?

A. I believe so.

Q. When you went across the street did you go in the company of officer Flynn?

[fol. 80] A. Yes.

Q. Did you notice when Officer Flynn got there?

A. Yes.

Q. Did he arrive by himself in an automobile?

A. That's right.

Q. Where did he park his car?

A. Right in front of mine.

Q. Did he get out of his car and walk over to you and talk to you and stand there and listen to Mr. Feiner speaking—did he stand over by your car with you?

A. That's right.

Q. Do you remember when he went into Ben's liquor store to make a phone call?

A. Yes.

Q. After that you both went across the street where the meeting was being continued?

A. Yes.

Q. Before you and Officer Flynn went across the street to where Feiner was speaking, had Officer Flynn been over there previously?

[fol. 81] Mr. Kelly: If he knows.

A. I don't recall.

Mr. Feinberg: I object to any coaching on the part of the District Attorney—My question was very clear.

The Court: He may answer the question if he knows.

A. I said, I don't recall.

Mr. Greenberg:

Q. You don't recall whether he did?

A. No.

Q. You recall clearly everything else that happened there?

A. I don't recall that.

Q. You don't recall whether or not prior to

The Court: Now why repeat so many times. He said he does not recall.

Mr. Greenberg:

Q. From the time you and Officer Flynn went across the street to this meeting, did officer Flynn at any time return [fol. 82] to his car or go back across the street to the east side of S. McBride Street before the arrest was made?

A. You mean he went over there and came back?

Q. Yes.

A. When did this happen?

Q. I am asking you.

Mr. Kelly: That would not be material any way.

The Court: Ask him again.

Mr. Greenberg:

Q. There came a time when you and Officer Flynn went across the street?

A. Yes.

Q. Did Officer Flynn leave you to go back across the Street again before Feiner was arrested?

A. I don't recall, but I don't believe so.

Q. As far as you know, you did not separate at all?

A. We were separated in the crowd there.

Q. But not that Flynn could have gone across the street? [fol. 83] A. I don't recall that he did.

Q. Is it fair to say that the only time, from the moment that Feiner started to speak, that the only time an officer went over to the meeting was when you and Officer Flynn went over together?

A. I don't actually know that.

Q. You mean there were other officers in the vicinity?

A. I don't know. I did not see any.

Q. Are you saying that there might have been officers there that you did not see?

A. I doubt it, but I don't actually know.

Q. You don't know how many times Officer Flynn went back and forth across the street?

A. I know we went across the street together, once.

Q. And you know Feiner was arrested?

A. Yes.

Q. You don't know whether Flynn went across the street before the arrest?

Mr. Kelly: He's answered that.

[fol. 84] Mr. Greenberg:

Q. You say there were seventy-five people on the corner of S. McBride and Harrison Streets?

A. Yes.

Q. Which corner are you referring to?

A. It would be on the northwest corner.

Q. In what area were the people congregated?

A. On McBride Street, the west side.

Q. Over how much of a distance on the west side of McBride Street was this crowd?

A. I don't know, maybe thirty feet.

Q. You stated that the Feiner car was parked about forty or forty-five feet back from the corner?

A. Yes.

Q. Does that mean that the crowd was up to within fifteen feet of the corner?

A. I would say it was a little more than that.

Q. That is when you first got there?

A. Yes.

Q. What do you mean by a little more?

[fol. 85] A. Oh, twenty or twenty-five feet from the corner.

The Court:

Q. Instead of fifteen feet?

A. Yes.

Mr. Greenberg:

Q. So that from this point, twenty or twenty-five feet from corner to corner, were there any people?

A. Yes, a few people standing around.

Q. Are those people included in the seventy-five you say were congregated there?

A. No.

Q. That does not include the people who were on the corner?

A. That is right.

Q. So you have us believe that these seventy-five people were congregated in that small area——

A. The crowd started approximately twenty-five feet from the corner, that is what I mean.

Q. And extended back about forty-five feet?

A. I would say thirty or thirty-five feet.

[fol. 86] Q. The crowd extended thirty to thirty-five feet from where Feiner's car was and up to the corner?

A. No, twenty-five feet from the corner, approximately; twenty or twenty-five feet.

Q. From within twenty-five feet of the corner the crowd extended back?

The Court: You asked if the crowd was fifteen feet away and he said twenty to twenty-five feet. He said it started about twenty-five feet from the corner and extended up the street about thirty feet.

If you can make it any different, all right, but that is what he testified to.

Mr. Greenberg:

Q. Do you say this group of seventy-five people were present when you first arrived there?

A. Yes.

Q. During the time you were there did the crowd vary at all?

A. Well, some came and some went.

[fol. 87] Mr. Greenberg: I object to the District Attorney shaking his head for the witness's guidance.

Mr. Kelly: I merely shook my head in approval of what he said.

The Court: Well, I was not observing the District Attorney—He's a man of high character, just like counsel for the defendant.

Mr. Greenberg: Well, I saw him do it.

Mr. Kelly: It was done inadvertently.

The Court: I don't believe Mr. Kelly intended to do that, because he understands what is proper and what is not proper—So proceed and Mr. Kelly will try to conform with your idea here.

Mr. Greenberg: You say there came a time when you and officer Flynn went over across the Street to the Liquor store?

[fol. 88] Mr. Kelly: I object to that—It's repetition.

The Court: Oh, I will take it.

A. Yes.

Mr. Greenberg:

Q. When you got over there was that after the defendant had made these remarks about Mayor Costello and President Truman?

A. That is right.

Q. And was it also after the defendant had made the remarks or the statement about the negro people rising up in arms and fighting for their rights?

A. That is right.

Q. Did you have any trouble getting through the crowd yourself?

A. I did have a little difficulty, yes.

Q. What did you do to overcome that?

A. Well, I got through all right.

Q. You asked the people to get out of your way did you?

A. Yes.

[fol. 89] Q. Did they get out of the way?

A. Yes, they did.

Q. And no one threatened you or refused to get out of your way?

A. Not that I recall.

Q. While you were over there did you see any people walking around, or walking back and forth?

A. Yes.

Q. Did they walk through the crowd on the sidewalk?

A. That I did not notice—I noticed quite a few walking the road.

Q. You noticed that when you were across the street at the meeting?

A. Yes.

Q. While you were over there at the meeting did you see any people walking back and forth on the sidewalk?

A. When I was in the crowd I did not notice any, no.

Q. Did you notice any pedestrians walking in the road at that time?

A. I did not notice that.

[fol. 90] Q. Did you notice that when you were in your car?

A. Yes.

Q. How many people did you see walking on the highway?

A. Maybe eighteen or twenty.

Q. Were there any obstructions on the sidewalk, on the east side of the highway on McBride Street.

A. No, I don't believe so.

Q. There was plenty of room to walk back and forth over there?

A. Yes.

Q. Do you remember, of these eighteen or twenty people, whether they were traveling in a southerly or in a northerly direction?

A. They were traveling both ways.

Q. Did any of those people come over to complain to you that they had been forced into the road?

A. Outside of the one fellow that came over with the woman and a couple of children, that is all.

Q. This man that came over with his family, he did not [fol. 91] complain about not being able to walk on the sidewalk, did he?

A. No.

Q. So that no one complained about having to walk in the road, isn't that true?

A. Well, there was a couple of people in the crowd that said, "how long have we got to put up with this?"

Q. I am talking about anyone that came up and complained to you or Officer Flynn about not being able to walk on the sidewalk.

Mr. Kelly: I object, he's covered all that.

The Court:

Q. Did anyone come over and complain about not being able to use the sidewalk?

A. No.

Mr. Greenberg:

Q. You were in a Police car that night?

A. Yes.

Q. And the word, "Police" was on the side of the car? [fol. 92] A. Yes.

Q. And you were in uniform?

A. Yes.

Q. If anyone wanted to make a complaint, they could have come over across the street and talked to you without any trouble?

A. Yes.

Q. Now, there's a brick wall of the drug store on the west side of South McBride Street?

A. Yes.

Q. Was the defendant standing somewhere opposite that brick wall?

A. He was located east of the wall.

Q. In the neighborhood of that brick wall?

A. Yes.

Q. Did you notice any people leaning against the brick wall of the drug store?

A. I did not notice.

Q. Did you make any actual count of the people there?

A. No.

[fol. 93] Q. Did you make up your mind that night that there was seventy-five people there, or did you arrive at that calculation later on?

A. I figured at the time that there was about seventy-five people.

Q. You figured that while you were on the scene there?

A. Yes.

Q. But you did not count them?

A. No.

Q. Now, you say when you walked through the crowd, some people seemed to be in favor of the speaking and some against him?

A. That is the impression I got.

Q. Did anyone start any fight?

A. I did not see any fight, no.

Q. But you say a man came up with his family and made the reference about "that son of a bitch" and so forth?

A. Yes, I assume it was a family—there was a woman and two children with the man.

[fol. 94] Q. Were those four people part of the seventy-five you are referring to?

A. No.

Q. You heard some say, "how long do we have to put up with this?" How many people said that?

A. Probably three that I heard.

Q. Did they say that to you?

A. Two of them said it to me.

Q. That was when you got across the street?

A. On the Feiner side of the Street, yes.

Q. Those two people were a part of the crowd of seventy-five?

A. Yes.

Q. Were they pedestrians—trying to use the sidewalk?

A. They were part of the crowd as far as I know.

Q. So that out of the crowd of seventy-five, there were only two people who made a complaint?

A. I believe I said there were three. Two made a complaint to me.

[fol. 95] Q. Did they speak directly to you?

A. Yes.

Q. And you say there was a third person who made a complaint, but not to you?

A. Yes, he made a complaint it seems with reference to a friend of his—I think that's how it was.

Q. So we arrive at a total of three people out of a crowd of seventy-five that made any complaint from the time you arrived on the scene until you left?

A. Three that I came in contact with.

Q. Two that spoke directly to you, and one other that you heard?

A. Yes.

Q. While you were sitting in your car did anyone other than this man with a family of four, this man and woman and two children, complain to you? Did anyone come out of any of the houses around there and complain to you?

A. I don't recall. No, I don't think so.

[fol. 96] Q. If they had you probably would have remembered it?

A. Yes.

Q. How long were you there at the scene from the moment you arrived until you left?

A. Maybe twenty-five minutes or thirty.

Q. About a half an hour?

A. Yes.

Mr. Kelly: He said twenty-five minutes.

A. I said approximately twenty-five minutes.

Mr. Greenberg:

Q. Officer Flynn was there approximately the same length of time?

A. No, he got there after I did.

Q. How long after you got there?

A. Five or six minutes.

Q. So he was there around twenty minutes altogether?

A. Yes.

Q. During all that time only this man, with the woman and two children made any complaint directly about the [fol. 97] speaker?

A. As far as I can recall.

Q. How old were these children with that man and woman, about eight or nine years old were they?

A. Yes, about that I should say.

Q. They were the only people that approached your car to make a complaint?

A. As far as I know, yes.

Q. The defendant was talking all during this time?

A. Yes.

Q. And during this time there were about eighteen or twenty people that had to leave the sidewalk and go into the highway because they could not get through the crowd?

A. Yes.

Q. There was nothing obstructing your view across the street was there?

A. No.

Q. With reference to the remarks that you claim Mr. Feiner made about Mayor Costello, tell us what he said, as much as you can remember?

[fol. 98] He called him a champaigne sipping bum.

Q. We heard you say that before—What else did he say in reference to Mayor Costello?

A. I think he said the Mayor was out of town at the time attending a party or some celebration, and he made a statement like, "do you think that Champaigne sipping bum would help you?" Something like that.

Q. What else did he say?

A. He made reference to the negroes—that they did not have equal rights. He said the only way they would get their rights would be to rise up in arms and fight.

Q. What else did he say?

A. He called President Truman a drunken bum and Mayor O'Dwyer of New York City a drunken bum.

Q. Anything else?

A. That's all.

The Court.

Q. What about the American Legion—did he make any reference to them?

[fol. 99] A. He called them Nazi Gestapo Agents.

Mr. Greenberg: I object to the Court's question—it's leading—I asked if there was anything else that was said and the witness said no.

The Court: Overruled.

Mr. Greenberg: Exception.

Q. Now, did he say anything else that you can recall?

A. It's hard to recall everything.

Q. Then that is all you can recall?

A. Yes.

Q. He talked close to a half hour, all the time you were there?

A. Yes.

Q. You say you were there about twenty-five minutes in all?

A. Yes.

Q. Anything else in this speech that the defendant made [fol. 100] over a period of twenty-five minutes that you can remember?

A. No, I don't recall much of it—He made reference to the John Rogge meeting at the hotel Syracuse I guess.

The Court: No, you can't state what you guess.

A. Well I know he made that reference. He was advertising this meeting, and he made mention of those four colored fellows in New Jersey, something about their getting a bad trial.

Mr. Greenberg: Did he say anything else with reference to Mayor Costello?

A. Not that I can recall.

Q. Did he say anything about President Truman except that he was a drunken bum?

A. He said that the negroes did not enjoy equal rights.

Q. There isn't much about this speech that you do remember except the name calling?

[fol. 101] A. I do remember what the speech was about, but I can't remember it in exact detail—some of the remarks were just thrown in.

Q. Now when you went over to Feiner did you have instructions to arrest him?

Mr. Kelly: He can tell what he did—I object to it in that form.

The Court: I will permit him to answer the question.

A. No.

Mr. Greenberg:

Q. You were not going to arrest him at that point?

A. I did not have any intention of doing so.

Q. Were you going to arrest him if he came off the box the first time you asked him?

A. What do you mean?

The Court: I don't believe that is proper. He said he had no instructions to arrest him, and had no intention of [fol. 102] doing so. Now assuming the defendant might do something else, something further which might have resulted in the arrest, what the officer might do in that event is something else again, and is not proper here.

Mr. Greenberg:

How many times did Officer Flynn ask Mr. Feiner to get down off the box?

A. He asked him once.

The Court:

Q. He asked him once?

A. Yes. He asked him to get down the first time; he told him to get down the second, and demanded the third.

Q. Did Feiner at any time say he would not get off the box?

A. Well, he kept right on talking.

Q. After the first one, did Officer Flynn make another request?

A. Yes, he told him to get down off the box.

[fol. 103] Q. Then what did Feiner do?

A. He kept on talking and made some reference to the law arriving, and then Officer Flynn demanded that he get off the box.

Q. Did he get off then?

A. Yes.

Q. How long a time elapsed from the time Flynn first asked Feiner to get off the box until he was placed under arrest?

A. Maybe four or five minutes.

Q. But at no time did Feiner say to you that he would not get off the box?

A. No, he made no statement that he would not get off.

Q. He advised the People that the law had arrived?

A. Yes, "the law had arrived and would take over," something like that.

Q. He did not continue with the substance of his speech after he was asked by Flynn to step down?

A. At first he did, but then he made reference to the police arriving.

[fol. 104] Q. Did he step off the box voluntarily?

A. After Flynn demanded that he do so.

Q. Flynn did not have to take hold of him?

A. I would not say so.

Mr. Greenberg:

Q. You had the Feiner car under observation at all times, did you?

A. I saw it, yes.

Q. You saw it for a period of some twenty-five minutes?

A. Yes.

Q. Were there some loud speakers attached to the car?

A. Yes.

Q. Where?

A. On the roof.

Q. How many were there?

A. Three, I believe.

Q. Don't you know?

A. I would say three.

[fol. 105] Q. Are you stating that as a fact?

A. Yes, I will say three.

Q. Are your observations in regard to the loud speakers as definite as your observation in regard to the crowd and the things Feiner said?

Mr. Kelly—I object to that—he can tell what he saw.

Mr. Greenberg:

Q. Do you remember how many loud speakers there were?

A. There was three.

Q. You saw three?

A. Yes.

Q. Now, you say you were patrolling that area that night?

A. That's correct.

Q. Has it been your duty on occasions to patrol that area?

A. Yes.

Q. You have come by that intersection of McBride and Harrison Streets on many occasions?

[fol. 106] Mr. Kelly: I object to it as having no bearing on this situation.

The Court: What bearing would that have, Mr. Greenberg?

Mr. Greenberg: I want to draw a comparison between this night and other nights in reference to crowds and things of that nature.

The Court:

Q. Have you ever seen any crowds down there before at this point?

A. No, just boys on the corner there—sometimes a group of young boys would stand around there.

Mr. Greenberg:

Q. Have you seen fairly large numbers of people on that corner on previous occasions?

A. Not large numbers.

Q. How many would you say?

Mr. Kelly: I object to it—I think we should confine ourselves to this particular night.

[fol. 107] Mr. Greenberg: I think we are entitled to know what kind of area that is, and the number of people that congregate there.

The Court: Well, let the witness tell what he observed. Can't you put a little more life into your answers, Officer? You ought to be more specific as to what you saw. Have you ever seen crowds of people congregate on this corner before?

A. I never saw any crowds like this one before. Sometimes I would see a group of boys there, ten or twelve of them.

Mr. Greenberg:

Q. Ever see fifteen or twenty people in a group on the corner there?

A. I don't think I ever saw fifteen or twenty in one group.

Mr. Greenberg: I think that is all.

[fol. 108] Mr. Kelly:

Q. Regardless of whether this defendant refused to get off the box or not, the fact remains that he did not get off when the Officer told him to, did he?

Mr. Greenberg: That's objected to as repetition.

The Court: Yes, that appears very clearly. Objection is sustained. We will take a recess until two P.M.

Proceedings: 2:00 P.M.

Mr. Kelly: If the Court please, the People rest.

Motion to Dismiss

Mr. Greenberg: At this time I would like to move to dismiss the information on the grounds that the People have not established beyond a reasonable doubt, the guilt of the defendant. The defendant here, has been charged with a [fol. 109] violation of what appears to be more than one subdivision of Section 722 of the Penal Law; one of them being, causing a crowd to congregate, and it is the contention of the people that there were seventy-five people on that corner which constituted that crowd.

It is our contention that a crowd of seventy-five people would not constitute Disorderly Conduct, and that it is not within the jurisdiction of the Police or of the Courts to set a limit on the number of People who may participate in a Public meeting.

I think we have to come to some agreement on the Argument of the motion to dismiss on Tuesday, that it is not unlawful to hold Public meetings on City streets, and that in order for such a charge to be sustained there must be proof that there was a breach of the peace by reason of that meeting taking place, and the circumstances that occurred at the time of the meeting.

The People's own witnesses testified that there was no [fol. 110] disorder—it appeared to the Police officers that there was a little muttering, some for, and some against the speaker. I don't think this Court will hold that because some people disagreed with the speaker, that that makes a meeting unlawful. It might be that some of the audience could take unlawful methods to express their displeasure

which might result in a basis for the charge of Disorderly Conduct, but that did not take place in this case, because there was no disorderly Conduct as such.

One Police Officer testified that there were about ten people who were forced into the highway because of the crowd on the sidewalk, but the other officer testified that there were eighteen or twenty. Both seemed to be quite vague on that point—there is quite a bit of doubt as to whether they are correct. The only thing they were clear about was the language that was used.

I maintain, that even assuming that some people did walk into the highway; and there was no testimony to show why [fol. 111] they walked into the highway, it's a conclusion on the part of the Police Officers that they walked into the highway because there wasn't room on the sidewalk.

No one complained to the Police officers. While the two police officers were across the street in Police cars not one person from that audience came over to the policemen to complain about anything with reference to the meeting. It wasn't until on their way over to arrest the defendant that some person made a reference to "having to put up with it," and that person or any other person could have walked away—no one had to stand there and listen to the speaker—they could have walked around the corner or into the houses there.

So, you have a situation in which you have, assuming all these things took place; assuming there was a meeting and seventy-five people were there and the so-called language used, still the People had failed to proove what is required as a basic part of Section 722 of the Penal Law, that there must be intent to provoke a breach of the Peace. [fol. 112] There is absolutely nothing that occurred, as appears from the testimony of the two Police officers, the two witnesses for the People who were actually there—and there's nothing circumstantial about it, they were there; there is nothing in their testimony from which a conclusion can be drawn that there was a breach of the Peace or a tendency toward a breach of the Peace. Even assuming that everything they said is true, there has been a fatal defect in the People's case.

There's another aspect, in reference to the conversation that took place at the time the defendant was arrested—both of the Police officers testified that that was the first

time that any instructions had been given by the Police, either to the crowd collectively, individually, or to the speaker. They came up there and asked him three times in a period of two minutes to step down. The defendant did not say he would not get down. The Officers testified he kept right on talking and finally, the third time he was asked, he got down from the box voluntarily, and went with the Police officers. I maintain that is not disobedience [fol. 113] to the request of the Police. Is the Court going to determine that the defendant is guilty because he complied with the police after the third request and not after the first—I think a defendant has the right to think over such an order on the part of Police Officers, and it seems to me that it is beyond the jurisdiction of the Court to say that three requests is enough to constitute a refusal. There has been a complete failure here on the part of the Prosecution, and I would like to point out to your Honor the case I referred to in my argument, People vs. Nixon——

The Court: Yes. I read all those cases you cited, I am familiar with them.

Mr. Greenberg: Well, that was a case decided in the Court of Appeals—a group of pickets marched down in front of an area-way so that certain people had to walk in the roadway because of the presence of these pickets. The defendants there were arrested and charged with [fol. 114] Disorderly Conduct. Now, in the first place, the Court stated that the worse that could be said about the defendants was that they may have been guilty of bad manners, but that there was no disorderly conduct in picketing, and I have the exact language of the Court here and that is, that the incidence of inconvenience to the pedestrians is an inconvenience to be borne by the public in order that the right of free speech may be maintained——

I want to call to your honor's attention all of the cases I have cited as proof that there's been absolutely no violation of the law. I cited cases in reference to the language and the Court stated that perhaps the language in itself would not be a violation of the law, but that in connection with the other circumstances it might be, and to wait until all the evidence was in; circumstances which in themselves might constitute disorderly conduct; yet, there's been no evidence whatsoever, that as a result of this language anything untoward happened as the result of that meeting.

I maintain that there will always be, in any public [fol. 115] meeting, whether it be held in a public auditorium or any where else, there will always be at least one person in that audience who objects to the sentiments of the speaker.

Does that mean that one person in that crowd, who is at liberty to leave whenever he wishes, can act as a censor as to what should be said? I believe that, considering that there was only one person who objected to the speaker, and I neglected to ask the witnesses whether there was evidence that he might have been slightly intoxicated, whether that one person can act as a board of censorship. If that ruling is made in this case then it will be a ruling that any meeting in the City of Syracuse, on the streets of the City of Syracuse may be prevented by the action of one person, not a person in authority.

Insofar as the seventy-five people are concerned—if your Honor took a pencil and paper and figured it out, the area, I think is something like forty or thirty-five feet by fourteen feet in which these people were congregated; that is something like four hundred and ninety or five hundred square feet—That is the area in which these people were congregated.

[fol. 116] The Court: Well, I don't think that was fixed with any mathematical certainty. The Officers testified that the crowd was gathered in the place between the Feiner car and the building, and around the building where the drug store is located, and that the crowd blocked the sidewalk so that pedestrians were forced into the street. Both officers gave estimates as to the distance from the corner to the point where the one side of the crowd reached, and the distance that the crowd extended down the street.

Mr. Greenberg: But they did say they were crowded in an area thirty-five by fourteen feet. If you divide seventy-five people into five hundred square feet you get about six square feet per person; two feet this way in breadth, and three feet deep; that is quite a bit of room for a person to be standing in any public meeting. An area three feet by two feet is pretty good. Now you might say these seventy-five people were congregated in one small group at one point, does the defendant become guilty by reason of that?

[fol. 117] The Court: I am not so concerned about the area covered by those people—I don't think we are to be bound by any figures here in that exact way. The crowd, according to the testimony, occupied the space between the sidewalk and the building, and it's testified to here that the gatheri g of this particular crowd in that particular space interfered with pedestrians passing down the street.

The basis of the action here, is not whether or not disorderly conduct actually occurred, but whether or not the circumstances furnished the occasion for a possible act or acts that would come within the classification of disorderly conduct. The question is whether the combination of circumstances there, the fact of the meeting; the talk being delivered over the loud speaking apparatus, which in and of itself is perfectly proper; the attitude of the crowd as testified to by Officer Flynn; the angry muttering; the expression of this one man who by that statement, indicated his attitude; and the remarks that the officers testified to that were overheard in this crowd, the question is, whether or not with this combination of circumstances there [fol. 118] was a possible occasion for a disorderly conduct as the officers appraised the situation there.

I think that is the point here. If the combination of these things created a situation wherein the officers concluded that there was danger that a situation might arise that could involve disorderly conduct, then I would think that the officers would be not only acting within the realm of their duty, but I think it would be good judgment on the part of the officers to step in and try to avoid and head off any such development as that.

I think that the attitude of the man who made the remark indicating how he felt climaxed these other things; this appeal that was being made by the defendant at that time to these people to rise up with arms and fight.

Mr. Greenberg: I disagree—they did not say that—The testimony says rise up in arms.

[fol. 119] The Court: All right, rise up in arms then. I think the implication and the fair inference to be drawn from that would be such as to cause the officers to feel that a possible occasion of a disorderly act was present.

Mr. Greenberg: Then the officers could have stopped the meeting.

The Court: What do you say Mr. Kelly?

Mr. Kelly: It appears that these officers were very lenient. They did not go down there with the idea in mind of making an arrest. They watched the situation and mingled with the crowd, and they were able to estimate the temper of that crowd. They heard this dissertation and the comments made by various people and this was climaxed finally by one of the people telling the officer that if he did not get the defendant down off the box he would get the son of a bitch off himself. Then that is followed by [fol. 120] the defendant urging the people to get up in arms or with arms and fight, and it doesn't make any difference whether he said, in arms or with arms, because it aroused them to a point where the officer knew that a riot or a disorder was imminent. That is all that was necessary to bring this case within the particular section with which this man is charged with violating.

Insofar as the time it took this man to cease talking, one officer said it was two minutes and one officer said four. Two minutes is a lot of time when anything is coming to a climax. If you take out your watch and hold it in your hand, why all hell could break out in two minutes, and I submit to your honor, has a police officer got to stand by and be at the mercy of the whim of someone who is disobeying the law to say just when he will wind up. He was requested first to stop, and he disregarded the officer—the officer had just passed through a group of people, and three of those [fol. 121] people had said to him, "how long do we have to put up with this?" The officer had a perfect right to do as he did—and even after the second request the defendant still goes on speaking in his flippant manner, disregarding any authority, and wise-cracking about the law, still talking to the people and doing something to egg this crowd on to accomplish some purpose which is best known in the mind of this man himself.

The effect of his words was to bring a crisis, an outbreak and disorder more imminent every minute, and apparently counsel feels that the defendant should receive some consideration because he finally did get down off the box after being requested three times to do so.

Are we going to have a Sunday school group of police officers, or what? Are they going to have to plead with someone as they had to with the defendant, or as they did do with the defendant, and that is why I say these officers

were very lenient. I say that considering all the circum-
[fol. 122] stances and the class of people to whom the defendant was appealing the officers were perfectly right in making the arrest, especially in view of the fact that when he was asked to cease speaking the first time, whatever this defendant did after that he did reluctantly in defiance of the police.

Mr. Greenberg: May I express my disapproval of Mr. Kelly referring to the negro people in the fifteenth Ward as "that class of People."

The Court: I don't believe that Mr. Kelly intended by his remarks to cast any reflection on the colored People—That is something that should not occur, and I am sure Mr. Kelly agrees with me.

Mr. Kelly: Absolutely.

Order Denying Motion to Dismiss

The Court: So let's not talk any more about that. I think [fol. 123] there's a question here, on the officer's testimony of a dangerous situation arising, a possible situation developing there that might be an occasion for a breach of the peace, so I will deny your motion at this time.

Mr. Greenberg: Exception.

[fol. 124] Defendant's Case

James Carter: Called to the stand by the Defense; sworn, testifies as follows:

Mr. Greenberg:

Q. Your name is James Carter?.
A. Yes.
Q. Where do you live?
A. New Bedford, Mass.
Q. You are a student at Syracuse University?
A. Yes.
Q. Where do you live in Syracuse?
A. 665 Madison Street.
Q. You are in what year in school?
A. Sophomore.
Q. You are a veteran of the second world war?

A. Yes.

Q. Were you present on the night of March 8th, when the defendant was making a speech at the corner of South McBride and Harrison Streets?

A. Yes, I was.

[fol. 125] Q. Did you get there as he started to talk?

A. Yes.

Q. And did you stand somewhere in the vicinity of that corner during the entire speech?

A. I did.

Q. Did you make any observations as to how many people were there during the time the defendant was talking?

A. Yes, I would say there was from twenty to twenty-five people there.

Q. And did that number remain fairly constant?

A. Yes, people came and went but the number remained about constant.

Q. Did you see the Police cars containing Police Officers, Flynn and Cook?

A. Yes.

Q. Were those police cars parked across the street from where the defendant was speaking?

A. Yes.

[fol. 126] Q. Did you see the officer in the first car go back to the officer in the second car and talk to him there?

A. Yes, I did.

Mr. Kelly: I object to this line of questioning—let him tell what he saw.

The Court: Yes, that is the usual procedure, so let's try that.

Mr. Greenberg:

Q. You saw the police officers conversing across the street?

A. Yes.

Mr. Kelly: I object to the question in that form.

Mr. Greenberg: Well, I wanted to get to some starting point.

The Court: All right, go ahead.

Mr. Greenberg: Tell what happened with reference to the [fol. 127] Police officers from the time you first saw the officers until the arrest was made?

A. I saw them talking across the street, and I was listening to the speaker there awhile, and the next time I actually looked at the officers was when they came across the street and went directly to the Speaker's stand. I did not see them mingle with the crowd at all.

Q. Had they been across the street previous to that—had they come over to where Feiner was previous to that?

A. I did not see them.

Q. What did they do when they came across the street?

A. They went directly to the speaker's stand.

Q. Did you observe them as they walked across the street?

A. Yes.

Q. Did it look to you as though——

Mr. Kelly: I object to how it looked—let him tell what happened.

[fol. 128] Mr. Greenberg:

Q. Did you observe whether or not the officers had any difficulty in getting through the crowd?

Mr. Kelly: I object to that as calling for a conclusion.

The Court: Why don't you just ask the questions as I suggested before—in the manner in which Mr. Kelly thinks they should be asked, about what he observed. And then if there's anything you want to remind him of, that would be proper to do.

Mr. Greenberg:

Q. What did you observe as the Police officers went from their car across the street to the Speaker's stand?

A. When they got to the speaker's stand, it took me some time to work my way up, because the people started to collect around it when they saw the officers there, and when I got up to the stand—it was probably a matter of about twenty-five seconds, I heard them tell Mr. Feiner to get off [fol. 129] the box, and I saw Mr. Feiner hand the microphone to someone and he got off the box.

Q. How long did it take from the time the Officer asked Feiner to step down from the box until he got down?

A. He got down immediately.

Q. You stated that when the Police officers came over the people began to crowd around the stand?

A. Yes, that's right.

Q. Had they congregated around the stand previous to that time?

A. No.

Q. Prior to the Police Officers coming over to the speaker, the people had not congregated around the stand?

A. No, they were back against the wall before the Police came.

Q. Did you observe pedestrians walking around, back and forth?

[fol. 130] A. Yes.

Q. Did you see any pedestrians who walked in the road because they could not walk on the sidewalk?

A. No.

Mr. Kelly: I object—he can tell what he saw the pedestrians do.

The Court: Over-ruled.

Mr. Greenberg:

Q. What did you observe with reference to the spacing of the people there, in connection with the ability of the people to walk back and forth freely?

Mr. Kelly: I object to that—the witness doesn't know what constitutes the ability to walk back and forth—what might impede one person would not necessarily impede another—this witness is not qualified to answer such a question.

Mr. Greenberg: I want him to state what he saw in reference to that subject.

[fol. 131] The Court: All right, I will allow it.

A. I saw people walking back and forth without any difficulty because most of the watchers were against the wall—and I walked back and forth myself several times.

Q. At any time during the time that you were there and the Police officers were there, did you observe the Police officers giving any instructions to the people in the crowd?

A. No.

Q. Did you see how many loud speakers there were on the truck?

A. Yes, two.

Q. With reference to the language that the defendant used, you listened to the entire talk did you not?

A. Yes.

Q. You were present in the range of his voice at all times?

A. Yes.

[fol. 132] Q. Did you hear the defendant call Mayor Costello a champaign- sipping bum?

A. No.

Q. Did he call him that?

A. No.

Q. Did he make any reference to Mayor Costello, in regard to his sipping champaign-?

A. He said that Mayor Costello was too busy sipping champaign- in New Orleans to be concerned with the Housing in the City of Syracuse?

Q. Did he call Costello any names?

A. No.

Q. Did he call Mayor O'Dwyer of New York City a bum?

A. No.

Q. Did you hear him call President Truman a drunken bum?

A. No.

Q. Did he call him a drunken bum?

A. No.

[fol. 133] Q. Did he call the members of the American Legion, "Nazi Gestapo Agents?"

A. No.

Q. Did he say to the crowd in words or in substance, that they should rise up in arms and fight?

A. No, he did not.

Q. Did he make any reference to rising up and fighting?

A. He told the people they could rise up and fight for their rights by going arm in arm to the Hotel Syracuse, black and white alike, to hear John Rogge.

Q. Did he make any reference at all to President Truman?

A. Yes.

Q. What did he say in that connection?

A. As far as I can recall he referred to the President when he said, "After Roosevelt died, this man came in and took over", that is all I heard.

Q. Did he make any reference to Mayor O'Dwyer?

A. That was just a slip of the tongue. He was talking about Mayor Costello and he said O'Dwyer by mistake.

[fol. 134] Q. Did he call him a bum?
A. No.

The Court:

Q. You thought it was a slip of the tongue?
A. Yes, he said, Mayor O'Dwyer of Syracuse. He was talking about this City administration.
Q. Can you recall just what he said?
A. Not specifically.

Mr. Greenberg:

Q. Did he mention the American Legion?
A. The American Legion leadership, yes. He said the leaders did not represent the American Legion membership.
Q. You say the defendant talked about Housing in the City of Syracuse?
A. Yes.
Q. Did he talk about equal rights for negroes?
A. Yes.
Q. How long would you say he talked?
[fol. 135] A. About a half hour.
Q. Did he tell about the permit for the John Rogge Meeting being cancelled?
A. Yes.
Q. Are you connected with the organization sponsoring that meeting?
A. Yes.
Q. What is the name of that organization?
A. The Young Progressives of America.
Q. Do you belong to the University chapter of the Young Progressives?
A. Yes.
Q. Prior to the time you arrived at this meeting, were you out distributing leaflets in connection with the meeting that was to be held at the Hotel Syracuse?
A. Yes.
Q. That was the meeting at which John Rogge spoke?
A. Yes.

Mr. Greenberg: That is all.

[fol. 136] JAMES CARTER:

Cross-examination.

By Mr. Kelly:

Q. I did not get your name?
A. Carter, James Carter.
Q. How long have you been at Syracuse University?
A. Just this year.
Q. Where were you last year?
A. At San Jose State College in California.
Q. What course do you take?
A. Liberal Arts.
Q. Do you belong to the Theodore Dreiser Club?

Mr. Greenberg: I object to any affiliations of this witness. I intentionally brought out the fact that this defendant was associated with one of the organizations sponsoring this meeting so that there would be no claim that he was concealing the fact that he was involved with this organization. But any other organizations are irrelevant and I seriously object to this line of questioning by Mr. Kelly.

[fol. 137] The Court: Well, I don't know what that club is.

Mr. Greenberg: Whatever it is, it has nothing to do with this case.

Mr. Kelly: This is cross-examination. I would like to determine his credebility.

Mr. Greenberg: Without knowing first, what the nature of this club is, I will state to the Court that I will strenuously object to any line of questioning that seeks to develop any affiliations of this witness or any other witness or of the defendant. That would have no bearing on the issues here, in this case. I want to say this for the record, that the only reason I brought out the fact that this witness was associated with one of the sponsoring organizations, was that I believed that was germain to the issue.

The Court: Perhaps the Theodore Dreiser membership, [fol. 138] if such membership would be established, would be just as important as the membership in the Young Progressives of America.

Mr. Greenberg: The District Attorney has not laid any foundation for it your honor.

The Court: I will over-rule your objection.

Mr. Kelly:

Q. Are you a member of the Theodore Dreiser Club?
A. I don't know what that is.

Mr. Greenberg: I think we ought to try the case on the issues here.

The Court: Well, I thought the question was just as proper as the question you asked as to whether the witness was a member of the Young Progressives of America.

Mr. Kelly:

Q. I think you said in your direct examination that you [fol. 139] listened to the speaker for a while and then you turned your attention to watch the officers?
A. For a matter of two or three seconds, yes.
Q. How many seconds?
A. Just enough to see one officer get out of his car and go to the other car.
Q. Do you know what the speaker was saying at that time?
A. Yes.
Q. You both listened and looked at the same time?
A. Yes, I just watched out of the corner of my eye.
Q. Which corner? Which eye?

Mr. Greenberg: Well, I object to that as argumentive.

Mr. Kelly:

Q. Where were you at that time, in reference to the Speaker?
A. I was standing against the brick wall directly across from the officer's cars with the speaker at my left.
[fol. 140] Q. And the crowd out in front of you?
A. No, they were against the wall.
Q. All the time?
A. Pretty near.
Q. Any one up against you? How many rows were against the wall?
A. I can only answer one question at a time.
Q. How many rows of people against the wall?
A. One.
Q. And how many people in that one column?
A. Most of the people there; possibly fifteen.

Q. All lined against the wall?
A. Yes.
Q. In which direction were you looking?
A. I was looking toward the speaker.
Q. Where was the Speaker's car in reference to where you were looking?
A. To the left.
[fol. 141] Q. And where were the Officers' cars?
A. Almost directly across from me.
Q. Did you keep your eyes on the Officers from the time they first came there until they left?
A. No.
Q. So you don't know what the officers did all the time, do you?
A. Not all the time, no.
Q. Then why did you tell counsel that you were watching all the time?
A. I did not tell him that.
Q. You want to tell us now that you did not have your eyes on the officers all the while?
A. Not all the while, but through the arrest I did.
Q. Why were you so anxious to have your eyes on the Officers?

Mr. Greenberg: I object to that as argumen-tive.
The Court: Over-ruled.

[fol. 142] A. Anyone looks at the Police when they come on a scene.
Q. The Police were not bothering you?
A. I expected it.
Q. You expected the police to interfere, is that what you mean?
A. Yes.
Q. And why did you expect that?
A. Because it's been the expected thing at any function of the Young Progressives of America.
Q. What is there about this organization that you think you have always got to have some Policemen around?

Mr. Greenberg: I object to that as having no bearing on this case. He answered the question, but, what he expected has nothing to do with the issue in this case.
The Court: He says he expected the Police would come because that is the usual thing in this organization— Now

Mr. Kelly is asking another question on the same point, so I will allow it.

[fol. 143] Mr. Greenberg: Well, it's still irrelevant.

Mr. Kelly:

Q. How many people did you say were at this meeting?
A. At one time?
Q. Yes.
A. About twenty or twenty-five.
Q. And the defendant was talking for about how long?
A. About a half hour.
Q. He talked about a half hour and he did not get any more than twenty or twenty-five people out to listen to him?
A. That's right.
Q. You say you were distributing circulars a little while before?
A. Yes.
Q. You got to more than twenty people yourself in less — a half hour, didn't you?
A. That was down town.

[fol. 144] Q. How many times did you see Officer Flynn get out of his car?
A. I saw him get out once.
Q. You don't know how many more times he got out?
A. No.
Q. How many times did he cross the street?
A. I saw him once.
Q. And you don't know how many more times he crossed the street?
A. No.
Q. He might have crossed when you did not see him?
A. Possibly.
Q. Did you see him mingle with the crowd?
A. No.
Q. He could have and you not have seen him?
A. Yes.
Q. So when you say he did not do anything but walk across the street and talk to the defendant, then you are not telling the truth, are you?

[fol. 145] Mr. Greenberg: I object to that.
Mr. Kelly: Well, then you are mistaken, is that right?
Mr. Greenberg: I object to that as calling for a conclusion.

The Court: Over-ruled.
Mr. Kelly: You may answer.

A. I said, previously, that the Police walked across the street together and went directly to the speaker's stand— They did that immediately before the arrest.

Q. You don't know what they were doing before that?

A. I know they came from across the street.

Q. Could they have been in that crowd sometime or other?

A. They might have been.

Q. That is possible that they might have been in that crowd before coming to the Speaker's stand?

[fol. 146] The Court: He said they might have been.

Mr. Kelly:

Q. So when you say that they walked across the street once, and that was the only time they did anything, you are mistaken about that?

A. I don't believe I said that was the only time they did anything.

Q. Do you want to tell us now then, that you saw them come across the street more than once?

A. No, I saw them cross the street once.

Q. Did you see the officers on the side of the street where the speaker was?

A. Yes.

Q. Did you see them on that side of the street before the arrest?

A. No, just on that occasion when they came across the street and arrested Mr. Feiner.

Q. They could have been over there a half dozen times and you not seen them?

[fol. 147] A. It's very doubtful.

Q. At any event, you say you only saw them cross the street once?

A. Yes.

Q. What makes you think it was a slip of the tongue when Feiner referred to Mayor O'Dwyer of New York City?

A. Because the name of Costello fitted in— He was talking about this City administration, and the housing problem and the name Costello fitted with the sentence.

Q. You are not a voter up here?

A. No, not here.

Q. Was anyone sitting in that car that night?

A. What car?

Q. What car do you think? I am talking about the car that had the loud speaking system on it.

A. I don't know.

Mr. Kelly: That is all.

[fol. 148] Mr. Greenberg:

Q. Did you observe any muttering on the part of the crowd?

A. I observed only one man muttering.

Q. Did you see that man go up to the Police officer?

A. Yes.

Q. Did you observe anyone else making remarks about the meeting?

A. No.

Q. Did you observe that the crowd was at all excited?

A. No.

Mr. Kelly: I object to the question in that form—it's leading.

The Court: Yes, let him tell what he observed about the crowd.

Mr. Greenberg:

Q. What did you observe about the crowd?

A. Well, for one thing I observed that it was so very cold that most of the people were more concerned with keeping [fol. 149] warm than listening to the speaker—The person-ell of the crowd was constantly changing—Some people would come and others would leave—it was a very cold night.

Q. Was it dark?

A. It was getting dark.

Q. Was it a peaceable crowd?

Mr. Kelly: I object to that.

The Court: I will take it.

A. Yes, it was peaceful.

The Court:

Q. You said something about one person who talked with the police?

A. Yes, he went across the street and talked to him.

Q. You did not hear that talk?
A. No. He went over to talk to the police in the car.
Q. Was he alone at the time?
[fol. 150] A. Yes.
Q. Just the one man?
A. Yes.

Mr. Greenberg:

Q. Did you hear any people in the crowd make any complaint to the Police Officers when they came across the street?
A. No.
Q. Were you around where you could hear any conversation between the Police officers and the People?
A. Yes.

Mr. Greenberg: That is all.

Mr. Kelly:

Q. You say there were about twenty people lined up against this wall?
A. I said there were about twenty or twenty-five people —most of them were lined up against the wall, and of course when the Police came over they began to close in around the speaker.
Q. Was there anything or anyone between you and the speaker?
[fol. 151] A. Yes, about two or three people at that time.
Q. You saw the cops come from the other side of the street?
A. Yes.
Q. What happened then when the Police officers arrived on that side of the street where the speaker was?
A. Well, first I worked my way through where I could see what was going on better——
Q. Why did you have to work your way through?
A. Because I anticipated this.
Q. I don't care what you anticipated.
A. Well, as soon as the officers arrived over there the people began to crowd around the officers and the defendant. The whole crowd immediately surrounded them.
Q. All at once?
A. As soon as they could.

Q. You were kind of a little bit backward then in getting up to the front?

[fol. 152] A. That's right.

Q. Why did you want to work your way up to the front?

A. To hear what was going on.

Q. How much of a crowd did you have to go through?

A. Most of the people who were there—because as I say, when the crowd saw the officers there they immediately closed in.

Q. How many did you go through to get up to where the Police officers were?

A. What do you mean?

Q. You said you had to work your way through.

The Court: You made that statement. How many people did you go through?

A. You mean by-pass?

Mr. Kelly:

Q. Go through, or by-pass or whatever you want to call it?

A. Well the people were about four-deep in a circle.

Q. How many on the outside of the circle?

[fol. 153] A. I can't say.

Q. Well, if they were four deep as you say, the outside circle would be a little larger than the inside circle—of course, you might not get that in Liberal Arts. How many people were up around the speaker when the officers were there?

A. Just about all the people who were at the meeting.

Q. How many was that?

A. About twenty-five.

Q. How many more than that?

A. No more.

Q. Did you count them at any one time?

A. Of course I did'nt.

Q. So it could have been more?

A. I don't know.

Q. You did not count them?

A. No.

Q. How do you know there could not have been more than twenty-five people?

A. Because I knew there were twenty-five before.

[fol. 154] Q. Did you count the twenty-five?

The Court: He said he did not count them.

A. I estimated the number—I looked around to see how many people were there.

Mr. Kelly:

Q. Where did you look?

A. On the sidewalk.

Q. And how many people were on the sidewalk when you looked?

A. About twenty-five.

Q. And how many were up against the wall?

A. About fifteen or twenty.

Q. Twenty-five and fifteen makes forty or forty-five does'nt it?

A. I mean altogether, including those that were lined against the wall.

Mr. Kelly: All right.

The Court: How long did Feiner speak?

[fol. 155] A. About a half hour.

Q. During all that time the crowd never increased?

A. Well, they would come and go—they would stay a few minutes and then leave.

Mr. Greenberg: If the Court please, I have a number of University person-ell here in Court who have to leave in a little while. I would like to put them on the stand at this time.

The Court: All right.

[fol. 156] Robert Engler: called to the Stand by the Defense; sworn, testifies as follows:

Mr. Greenberg:

Q. Dr. Engler, where do you live?

A. In Syracuse.

Q. Where, at what address?

A. 100 Stadium Place.

Q. Are you associated with Syracuse University?

A. Yes.

Q. In what capacity?

A. As Assistant professor in the Department of citizenship.

Q. For how long?

A. Two years.

Q. Were you engaged in similar work at some other University before you came to Syracuse?

A. Yes, at the University of Wisconsin.

Q. For how long a period of time?

A. Two years.

Q. Do you know the defendant, Irving Feiner?

[fol. 157] A. Yes, as a student.

Q. How long have you known him?

A. He was enrolled in my class last fall—I have known him since last Fall.

Q. Have you had him in your class this term?

A. No.

Q. Will you tell us what you know about him with reference to his character and reputation on the campus?

Mr. Kelly: I object to it in that form.

The Court: That is not the proper form Mr. Greenberg. There is a simple form provided for framing a question of that type, and its the usual practice to insist on the question being framed in that manner.

Mr. Greenberg:

Q. Are you familiar with the defendant's reputation for truth and veracity on the campus of Syracuse Univer 'y?

[fol. 158] Mr. Kelly: I object—the question is still wrong.

The Court: Yes, that is still objectionable.

Mr. Greenberg: I think the witness is entitled to testify with reference to the defendant's reputation.

The Court: That is right—but you must ask it in the proper way, whether or not he knows the reputation of the defendant for truth and veracity according to the speech of the people in the community in which he resides.

Mr. Greenberg: I want to frame it as to apply to the area in which the witness is most likely to know—

The Court: The question you must ask is, "in the community where he resides."

Mr. Greenberg:

Q. Are you familiar with the reputation of the defendant [fol. 159] according to the speech of the people in the community in which the defendant resides and on the campus of Syracuse University?

A. I know him as a student in my class, and also from what other teachers have said concerning him.

Q. Do you know what these other teachers have said about him in reference to his reputation?

Mr. Kelly: I object to what anyone else said to this professor about the defendant.

The Court: Yes, it's just that one question that is important—whether he knows the defendant's reputation for truth and veracity.

Mr. Greenberg:

Q. What is his reputation?

The Court: No, that is not a proper question.

Mr. Greenberg: Well, I am sorry—I asked the witness [fol. 160] whether he's familiar with the reputation of the defendant by the speech of the people in the area in which he resides. I don't know what else I can ask him.

The Court:

Q. Do you know the reputation of the defendant for truth and veracity according to the speech of the people in the community in which he resides? Answer yes or no.

A. I would say, yes. If you consider the campus as the community. I don't know him off the campus.

Q. Do you say you do or do not know his reputation within the form of the question I have propounded, in the community where he resides?

A. I do with that limitation—I only know about his conduct in the class room and on the campus, or from conversation with faculty members who know him.

Mr. Greenberg: I think the witness may testify to the defendant's reputation on the campus of Syracuse University.

The Court: All right, let him go ahead.

[fol. 161] Mr. Greenberg:

Q. Is that reputation good or bad?

A. It's good.

Q. Does he have a reputation for intellectual curiosity?

Mr. Kelly: I object to that—that is way off. I think he's got that to a great degree.

The Court: Yes, that is improper in form. Objection sustained. The only question you can ask a character witness is the one you already put to him. Now he says that his reputation is good—and that is the only question that is permissible under our rules.

Mr. Greenberg: That is all.

[fol. 162] Cross-examination.

By Mr. Kelly:

Q. To whom did you ever talk to about Feiner?

A. I can think of several faculty members.

Q. When did you talk to them?

A. In the course of the past year.

Q. Did you have occasion to discuss the defendant?

A. As a student, yes.

Q. In discussing him as a student, did they bring up the question of his reputation for truth and veracity?

A. Not directly sir.

Q. Then you don't know anything about his truth or veracity from the speech of the people, do you?

A. I know that they referred to him as an inquiring student and a hard worker.

Q. Well he could be the biggest liar in America and be a hard worker; did anyone talk to you about his truth and veracity?

A. Yes.

Q. Did you talk about his truthfulness, did you?

[fol. 163] A. In relation to his work in the class room, yes.

Q. In what way was his truthfulness discussed—how did that enter this discussion you had with other faculty members?

A. Well, you can't say something as an absolute truth or falsehood in the field of social science.

Q. Well, never mind that—Was his truthfulness ever an issue before you?

A. I had never any reason to doubt it.

Q. Did you ever discuss his truthfulness?
A. No, not as such.
Q. Did you ever discuss the question of his veracity?
A. No, not as such.
Q. You might have discussed or talked about his marks and his adaptability, but you never discussed his truth or veracity?
A. That is right.

Mr. Kelly: I ask that this witness's testimony be stricken out.

[fol. 164] Mr. Greenberg: I believe the testimony of the witness may stand insofar as it demonstrates the statement of this witness that he knows the defendant's reputation to be good.

Mr. Kelly: He says he never discussed it with anyone. How can he testify as to his truth and veracity by the speech of the people when he never talked to anyone about it?

The Court: I will let his testimony stand.

Q. There's one remark you made about there being no absolute truth in the field of social science, will you explain that?
A. Well, truth is relative and has no absolute value in the social sciences. We speak about a student and his ideas —and in no contact that I have had with the faculty was there any question about his veracity.

[fol. 165] The Court:

Q. Didn't you say something about there being no such thing as truth in the social sciences?
A. In the social sciences truth is relative to circumstances. In that respect, Mr. Feiner has always been truthful—If he had something to do he always did it and was truthful about it.

The Court:

Q. You think truth is a relative term?
A. In certain problems I think it is.
Q. In social science it's a relative term?
A. I suspect so.
Q. And so what may be true today may not be true tomorrow?

A. Yes, or in two different people's eyes—it depends on circumstances or situations.

Q. But only in the social sciences?

A. No, it extends to religion and every other field.

Q. Truth is not fixed then?

[fol. 166] A. We can report a fact as true—If it is a fact it is true.

Mr. Greenberg:

Q. You have always found the defendant to be truthful with you?

A. Yes.

Mr. Kelly: I object to that as being immaterial. The only question counsel can ask him, if he's using this Doctor as a character witness, is to confine the question to the form, and he's already answered that.

The Court: Yes, he's already answered that and a lot more.

Mr. Greenberg: That is all.

[fol. 167] Byron Fox, called to the Stand by the Defense; sworn, testifies as follows:

Mr. Greenberg:

Q. Where do you live?

A. 511 Avery Avenue.

Q. Are you associated with Syracuse University?

A. I am.

Q. In what capacity?

A. As assistant professor of sociology.

Q. How long have you taught there?

A. Two years.

Q. Where did you teach before that?

A. I wasn't teaching previously—for three years I was with the United States department in Washington.

Q. Prior to that time were you teaching?

A. About six or seven years ago, yes.

Q. Are you familiar with the defendant, Irving Feiner?

A. Yes.

Q. Over how long a period of time has this familiarity with the defendant existed?

[fol. 168] Mr. Kelly: Now, is this witness here as a character witness? I think if he is, the questions should proceed along the proper lines.

Mr. Greenberg:

Q. How long have you known the defendant?

A. I have known the defendant a year and a half.

Q. Are you familiar with the reputation of this defendant on the campus of Syracuse University, as to truth and veracity in so far as the speech of the people on the campus is concerned?

A. Yes.

Q. Is that reputation good or bad?

A. It's good.

[fol. 169] Cross-examination.

By Mr. Kelly:

Q. Whom did you ever talk to about this defendant?

A. I have talked to several faculty members, including my office mate of last year, who talked to Feiner also.

Q. Did the question of this defendant's truthfulness come up for discussion?

A. It did not in that specific form.

Q. Was there any discussion about his truthfulness, just as such?

A. Yes, there was.

Q. To whom did you talk to about that?

A. To Dr. Milton Barron.

Q. Anyone else?

A. No other faculty members.

Q. Did you ever discuss the question of his veracity with anyone?

A. I am sure I have with Dr. Barron.

Q. At the same time?

[fol. 170] A. I am quite sure, yes.

Q. This all came up at one meeting?

A. No, over a period of some months.

Q. What was the occasion for discussing this man over a period of months?

A. It was during the past year, and there were many occasions when I or Dr. Bannon or the students frequently discussed the Political situation during campaign time.

Q. Well, that doesn't answer my question—When did the question, specifically of this man's truthfulness come up?

A. I am sorry, I do not understand.

Q. Isn't that a rather simple question? When did the question of the defendant's truthfulness come up?

A. Of course, I can't remember the exact dates, but I would say it was just about a year ago.

Q. And his veracity came up on the same day?

A. I can't remember the date.

[fol. 171] Q. Did you ever discuss him with anyone else except this one professor?

A. I discussed him with a number of students.

Q. What was the occasion for discussing his veracity with the students?

A. In connection with the Organization that has already been mentioned, and my interest in National affairs and the Political situation.

Q. How does it come you singled out this lone professor to talk about whether he was truthful or a person of veracity?

A. As I said before, I discussed the same subject with a number of students—He was only one of many I discussed in the same way.

Q. How many students did you talk to about him?

A. At least four or five.

Q. What are their names and where do they live?

Mr. Greenberg: I object to that question—I don't think there's any occasion to require this witness to list the names and addresses of students.

[fol. 172] A. I can give you several names.

The Court: No, I will sustain the objection—I think's he's gone far enough.

Mr. Kelly: That is all.

[fol. 173] Walter Sutton, called to the stand by the defense; sworn, testifies as follows:

Mr. Greenberg:

Q. Dr. Sutton, where do you live?

A. 1522 E. Colvin Street.

Q. Are you connected with Syracuse University?
A. Yes.
Q. In what capacity?
A. Assistant professor of English.
Q. Have you taught anywhere previous to your coming to Syracuse University?
A. Yes, at Ohio State and the University of Rochester.
Q. Do you know the defendant, Irving Feiner?
A. Yes.
Q. How long have you known him?
A. I have known him as a member of a class since the beginning of this academic year.
Q. Are you familiar with his reputation for truth and veracity according to the speech of the people on the Syracuse University Campus?
[fol. 174] A. I am familiar with him as a member of a class.
Q. And within that class are you familiar with his reputation for truth and veracity?

Mr. Kelly: I object—He did not say he was familiar with the defendant's reputation for truth and veracity by the speech of the people in the community where the defendant resides.

Mr. Greenberg: He's familiar with him at Syracuse University. I don't think the witness must talk about the defendant's home community. This witness would not know that.

The Court: Well, I never heard of the question being asked in any other than the usual way Mr. Greenberg. The question incorporates "the community in which he resides." I don't know as we ought to cut it down from the campus to the class.

Mr. Greenberg: I think we should, if that is the circumstance under which the witness knows him.
[fol. 175] The Court: I don't know that we are even permitted to confine it to the campus. It doesn't cover the area. The question to be proper should incorporate the phrase "by the speech of the people in the community where he resides." Now, this witness knows the defendant by reason of his being a member of his class. He knows him from seeing him in the class-room, and that is about all that appears here now. I don't think that affords a proper basis for allowing this witness to express an opinion. In

other words, it's got to cover more territory than that if the answer is going to mean anything.

The Court:

Q. Have you ever talked to anyone about this defendant in any way bearing on his truthfulness or veracity?

A. No, I have not.

The Court: I will have to sustain Mr. Kelly's objection.

A. I know him only by direct observation, and not by hearsay—I don't recall that I discussed his truthfulness or veracity with anyone else.

[fol. 176] The Court: Of course, the question, the way it's framed according to the legal requirements is based on the knowledge gained through the speech of the people. The witness says he has no such knowledge or information.

Mr. Greenberg: I will excuse the witness.

Mr. Kelly: No cross-examination.

[fol. 177] Stuart G. Brown, called to the stand by the defense, sworn, testifies as follows:

Mr. Greenberg:

Q. Where do you live?

A. 822 Maryland Avenue.

Q. You are connected with Syracuse University?

A. Yes, I am.

Q. In what capacity?

A. I am professor and director of the Citizenship program at the University.

Q. How long have you been connected with Syracuse University?

A. Since the first day of August, 1947.

Q. Have you taught at other colleges previous to coming to Syracuse?

A. Yes, seven years at Grinell and four years at the University of Wisconsin.

Q. How long have you known the defendant, Irving Feiner?

A. Since March or April of 1948.

[fol. 178] Q. Do you know the reputation of the defendant for truth and veracity according to the speech of the people on the campus of Syracuse University?

A. Yes.

Q. What is that?

A. It is good.

Mr. Greenberg: That is all.

Mr. Kelly: No cross-examination.

[fol. 179] SAMMY JAMISON, called to the stand by the defense, sworn, testifies as follows:

Mr. Greenberg:

Q. Where do you live?

A. 621 Harrison Street.

Q. Do you recall the night of March 8th of this year, when the defendant, Irving Feiner was speaking on the corner of Harrison and S. McBride Streets?

A. Yes, I do.

Q. Did there come a time on the night of March 8th, when you arrived at the corner of S. McBride and Harrison Streets?

A. Yes.

Q. S. McBride and Harrison Streets are streets in the City of Syracuse?

A. Yes.

Q. From what direction were you coming?

A. From down Townsend Street.

Q. Walking on Harrison Street.

A. Yes, east.

[fol. 180] Q. When you arrived at that corner did you hear the defendant, Irving Feiner speaking?

A. Yes.

Q. How long did you remain at the corner?

A. About five minutes.

Q. During that period did you notice how many people were congregated on that corner?

A. I did see about twenty or twenty-five people there—it was a cold night and the people were standing up against the wall of the building.

Q. You stayed there a little while did you?

A. About five minutes.

Q. And did you listen to the defendant talking?

A. Yes.

Q. Whether or not you heard the defendant call Mayor Costello a champaign-sipping bum?

A. I did not.

Q. You were listening at the time?

A. Yes.

[fol. 181] Q. Whether he called Mayor O'Dwyer of New York City a bum?

A. He did not.

Q. Or President Truman a bum?

A. He did not.

Q. Whether he asked the people to rise up with arms and fight?

A. I did not hear that at all.

Q. After a while you left the meeting and went on home?

A. Yes.

Q. While you were there did you see any people walking in the road?

A. I did not.

Q. Did you see any arguments or fights among people in the crowd?

A. I did not.

Mr. Greenberg: That is all.

[fol. 182] Cross-examination.

By Mr. Kelly:

Q. You don't know how many people were there at that meeting before you got there?

A. No.

Q. Nor how many people were there after you left?

A. No.

Q. And you don't know what was said by the defendant before you got there?

A. No.

Q. Nor what was said after you left?

A. No.

Q. You stood there you say about five minutes?

A. Yes.

Mr. Kelly: That is all.

[fol. 183] MARY ARCHIE: called to the Stand by the Defense; sworn, testifies as follows:

Mr. Greenberg:

Q. Mrs. Archie, where do you live?

A. 719 S. McBride Street.

Q. Were you home on the night of March 8th, when this defendant was speaking on a street corner at South McBride and Harrison Streets?

A. Yes.

Q. Your home is located right across the street from where he was speaking, isn't that so?

A. Yes.

Q. Where were you at that time?

A. I was sitting in the window listening.

Q. Was the window open?

A. Yes.

Q. Had you opened it so that you could listen to the Speaker?

A. Yes, I listen every Friday night. They have someone talking there every Friday night.

[fol. 184] Q. Did you see the car driven up with the loud speakers on it?

A. Yes.

Q. Before the defendant started to speak did anyone else speak over the microphone?

A. I didn't hear no one but him, but I saw two more men out there at the car.

Q. Could you hear Mr. Feiner clearly during the time he spoke?

A. Yes.

Q. Were you listening to him up to the time he was arrested?

A. Yes.

Q. Did there come a time when some police officers drove up at the scene?

A. Yes.

Q. Where were the police cars parked?

A. One was parked right opposite my door—then I saw another police car pass, and he came back and parked in front of the first car. Then the cop got out of the car and [fol. 185] went over and talked to the other cop.

Q. The second car parked ahead of the first one?

A. Yes.

Q. Did you observe whether or not one of those cops went over across the Street?

Mr. Kelly: I object—from now on I think the questions should be a little different in form—they should not be leading. Let this woman tell her own story.

The Court: Yes, the questions should not be leading.

Mr. Greenberg:

Q. Did you see the cops there right along?

A. Yes.

Q. What if anything did they do?

A. Well, first long they stood up there by the car and talked a good while—and after they got through talking and this man was still speaking, they went over where he was.

Q. How many times did they cross the street to go over where the defendant was?

[fol. 186] A. Once, that is all I seen them.

Q. And was that one time, the time they arrested him?

A. Yes, they talked to him and then they took him over to the Police car.

Q. Did you see them take him in a car and drive away?

A. Yes.

Q. Were you able to see up to the corner?

A. Yes, I was sitting there and could look right up to the drug store. I could see everything there.

Q. About how many people were there on that corner listening to the defendant speak?

A. About twenty-five or twenty-six.

Q. Were some of those people leaning against the brick wall of the drug store?

A. Yes.

Mr. Kelly: Well, why don't you let her tell where they were? Counsel is placing them up against the wall as if they were to be shot at. We don't like that.

[fol. 187] Mr. Greenberg:

Q. Did you see the crowd there right along while the defendant was talking?

A. Yes.

Q. Will you tell us whether or not any people walked in the road because they could not use the sidewalk?

A. I did not see anyone walking in the road.

Q. Will you tell us what you observed about the crowd there with reference to whether or not people were walking up and down on McBride Street?

A. Well, when the cops came over to talk to Mr. Feiner the people drawed near to see what was going on.

Q. Before the officers came were people walking up and down the street?

A. No they were listening to the man talk.

Q. Were any people walking down the street?

A. I did not see any.

Q. Did you notice how many loud speakers there were on the car?

A. Two.

[fol. 188] Q. And did you hear everything that the defendant said in his speech?

A. Yes.

Q. And whether or not he called Mayor Costello a champaign- sipping bum?

A. I did not hear that. He was talking about the Housing Project, and he said Costello had not done nothing for the people.

Q. Did he call Costello a bum?

A. No, he did not. I heard everything but I did not hear that.

Q. If the defendant said Costello was a bum you would have heard it?

A. Yes.

Q. Did you hear him call Mayor O'Dwyer of New York City a bum?

A. No.

Q. Did he call him a bum?

A. No, he did not.

Q. Did he call President Truman a drunk?

[fol. 189] A. No.

Q. If he had said President Truman was a drunk you would have heard it?

A. Yes.

The Court:

Q. Did you hear him mention President Truman's name?

A. Yes, but he did not call him a bum.

Mr. Greenberg:

Q. Did he call President Truman a drunk?

A. No, he did not.

Q. And the only time the cops went across the street was when they arrested the defendant?

A. Yes, that is the only time.

Q. You remember how long the cops were standing there?

A. Well they talked about five or ten minutes standing up by the mike, then they took him and put him in the police car and left the other two there.

The Court:

Q. What do you mean—who were the "other two?"

[fol. 190] A. There were two more boys with him. I don't know whether they came with him or not but they were standing there.

Mr. Greenberg:

Q. Did the defendant at any time ask the people to rise up in arms and fight?

A. No, he said the people got to get together and rise up and fight for freedom.

Q. He did not say anything about arms?

A. I did not hear him say anything about that.

Q. And you say you hear everything he said?

A. Yes.

Q. From what you could see, was there room enough on the sidewalk for people to walk back and forth?

A. Sure, people were passing up and down.

The Court: You've already covered that Mr. Greenberg, and the question is improper in form. Anyway I don't see any purpose to be served by asking the question "whether there was room for other pedestrians to pass." Your [fol. 191] question is improper and calls for a conclusion.

Mr. Greenberg:

Q. Tell us where these twenty-five people were in reference to the speaker before the cops got across the street?

A. They were standing by the drug store, against the wall.

Q. Were any of them blocking the sidewalk?

A. No.

Mr. Kelly: I object to that—it's leading.
The Court: Over-ruled— I will allow the answer.

Mr. Greenberg:

Q. You say that when the cops came over to the speaker thet crowd began to move in to see what was going on?
A. Yes.
Q. The people crowded around the officers and the defendant?
[fol. 192] A. Yes.
Q. Did they crowd around before the cops came over there?
A. There were some standing near the man that was speaking, but the most of them were standing against the wall.
Q. Could you hear what any of the people were saying?
A. No.
Q. It wasn't loud enough so you could hear the conversation of the people?
A. No.
Q. But you did hear everything that was said over the loud speaker?
A. Yes.

Mr. Greenberg: That is all.

[fol. 193] Cross-examination.

By Mr. Kelly:

Q. You say that was a pretty cold night?
A. Yes, it was cool.
Q. Didn't you hear them say it was awful cold—didn't the other witnesses say that?
A. Yes, but I had a warm fire in the house—and that is why I sat by the window and had it open.
Q. So you put the window up and kept it up all that time that the defendant was speaking?
A. Yes.
Q. Were you trying to heat the out-doors?
A. Well, I don't know whether I was heating the upstairs or not, but it was warm in my house and I opened the window.
Q. Was one of those loud speakers pointed at you?

A. No, one was pointed down McBride Street and the other one was pointed the other way. I had my head right in the window looking out all the time.

Q. How long were you there at the window?

[fol. 194] A. Until the cops took him away.

Q. You were there from the time the defendant started to speak until the Officers took him away— How long was that?

A. I did not look at the clock, but I was sitting in the window when they drove up and Mr. Feiner started to speak, and I stayed there until the cops took him away. Maybe it was about ten minutes.

Q. All that took only about ten minutes?

A. Well, I don't know—I did not look at the clock.

Q. Well, that is what you said.

A. It was about five or ten minutes.

Q. Do you understand the question? How long was it from the time the defendant drove up there and started to speak until the officers took him away?

A. I don't know—I did not look at the clock.

Q. How long was it from the start to the finish?

A. A rough guess would be about fifteen or twenty minutes.

Q. Now, if you were at the window only about ten min-

[fol. 195] utes what about the other five minutes?

A. I was sitting there looking all the time.

Q. Then you don't know now whether it was ten minutes or fifteen or twenty minutes?

A. I know when the cops went over and started to talk to him—that is just a rough guess—then they carried him off.

Q. When this officer drove up and parked and then got out of his car and went over to talk to the other officer in the other car, did you see that?

A. Yes.

Q. Was that right under your window?

A. Yes, I was setting there looking at him.

Q. Were you looking at him or the crowd?

A. I wasn't paying no attention, I thought the cops were listening too.

Q. You were looking across the street?

A. Yes.

Q. Then you would not be looking across the street and

[fol. 196] down at the officers at the same time?

A. No.

Q. Did you see Officer Flynn go into Ben's liquor store?

A. I did not look to see that.

Q. You heard him testify that he went in there?

A. Yes, but I did not see him.

Q. You would not say that he did not go in there?

A. All I know is I did not see him go there.

Q. So you did not have your eyes on him all the while?

A. I did not say I did. In only said when the second officer drove up he went and talked to the other officer for a while.

Q. And you were not paying any attention to what they were doing?

A. That is right, but when they went across the street I watched, and I know when they went over to Mr. Feiner he stopped talking.

Q. If you were not paying attention you don't know what they were doing, do you?

[fol. 197] A. No, and I wasn't trying to find out.

Q. You were listening to the loud speaker?

A. That is right.

Q. You were not paying any attention to the Officers?

A. No, I did not think they were up to anything?

Q. So you don't know what they did?

A. I know they left the car and went over there—I was right in the window all the time.

Q. But what else they did you don't know?

A. No.

The Court:

Q. How long did you sit there with the window open?

A. I was sitting there when the car with the loud speakers drove up, and I never got up from the window until the cops carried the boy off.

Q. How were you dressed, as you are dressed now?

A. No, I had on my print dress and my bed-room shoes.

Q. And you say you sat there with the window open for a period of some ten or fifteen minutes?

[fol. 198] A. Yes, I had on my dress and bed-room shoes and I had a short coat on too.

Q. Did you have that short coat on before you opened the window?

A. Yes.

Q. And it was good and hot in your house?

A. Yes.

Q. Were you just as comfortable with the window open as closed?

A. Yes sir—it was mighty hot in there.

Q. Well, is that why you opened the window?

A. No, I opened it when they came up to speak—they come out every Friday night and I always listen to them.

Q. You sat in front of the window on this cold night with just the clothes on that you had on before?

A. Yes, I don't lie—it was so hot, and I got kind of sweaty, so I thought I might just as well heist the window to listen to them speak.

[fol. 199] Q. You don't dress the same on a cold day as on a hot day do you?

A. Well, I got it too hot in the house, and I was sweaty so I put my coat on because I knew I was going to open the window and listen to them speak.

Q. You know someone was going to speak?

A. Yes, they do every Friday night.

Q. These same people?

A. I don't know if they are the same one's or not.

The Court: That is all.

[fol. 200] LARRY LITTLE, called to the stand by the defense, sworn, testifies as follows:

Mr. Greenberg:

Q. Where do you live?

A. 458 W. Castle Street.

Q. What do you do for a living?

A. I am an instructor at Syracuse University department of Psychology.

Q. Were you present on the evening of March 8th, 1949 when Irving Feiner was making a speech on the corner of S. McBride and Harrison Streets?

A. Yes.

Q. Did you observe the loud speaking system that he used?

A. Yes.

Q. Did you observe it attached to the car?

A. Yes.

Q. The horns were on the roof of the car?
A. Yes.
Q. Had you had anything to do with this loud speaking [fol. 201] equipment previously?
A. Yes, many times.
Q. Had you made some minor repairs on it?
A. Yes.
Q. Will you tell us how many horns this loud speaker consists of?
A. Two.
Q. I show you defendant's exhibit (1) and ask you, is that is a part of the loud speaking equipment that was attached to the car from which Feiner was talking?
A. Yes.
Q. Are those the horns that were attached to the roof of the car?
A. They are.
Q. And whether or not the board to which the horns are attached is the same board that was in use that night?
A. Yes, that is the same board.
Q. Whether or not the equipment as shown here has any attachment so that a third horn can be attached?
[fol. 202] A. No, there's no attachments there.

The Court:

Q. Could a third horn have been attached?
A. Yes, five or six could be attached conceivably.
Q. There were only two horns used the night of March 8th?
A. Yes.
Q. And you say these horns here are the ones used?
A. Yes.

Mr. Greenberg:

Q. These two horns were attached to the car from which the defendant was speaking?

Mr. Kelly: I object to that—in the first place it's immaterial, and secondly, there's nothing to show that this exhibit is in the same form and shape it was on the night in question. It clearly appears that it could have been rigged up to attach four or five or six horns. It's a matter of hook-up as it was that night, and it's immaterial.

[fol. 203] Mr. Greenberg: The Police testified there were three horns.

Mr. Kelly: The Police testified they believe there were there horns.

The Court: I don't see why that is important anyway.

Mr. Greenberg: It goes to the credebility of the Police officers. If they were mistaken about the horns they might be mistaken about other things. I offer the horns in evidence.

The Court: Well, it appears from this witness that there were just two outlets on the night in question. Don't you think the proof you already offered here covers the situation? What's the point of having the horns in evidence?

Mr. Greenberg: To corroborate the testimony.

The Court: All right, I will receive them.

[fol. 204] These are the horns identified by this witness as the ones that were on the car on the night in question—If I seemed reluctant to receive them it is because I have in mind that ordinarily the exhibits are kept here, and kept here so long as there is any chance of there being needed in any other court. Now, if you want the horns to go in evidence subject to the usual practice here of keeping them along with the other exhibits, I am perfectly willing to have them accepted here as exhibits.

Mr. Greenberg: In that case, I will reserve decision as to whether I want to renew my motion on that score, and decide later.

The Court: All right.

Mr. Greenberg:

Q. At what point did you get to this meeting?

A. When it first opened up.

The Court: Did you have anything to do with setting up [fol. 205] the speaking apparatus or was it all adjusted before?

A. On the night in question I helped put the apparatus on the car and secured it with ropes, and connected the microphone and battery.

Mr. Greenberg:

Q. And there were two horns when you helped put it on?

A. Yes.

Q. Were you present during the entire time of Feiner's talk?

A. No.

Q. At what point in his talk did you arrive on the scene with reference to the time the defendant was arrested—that is, how long had you been there by the time he was arrested?

A. I was not there when he was arrested.

Q. How long a period were you there?

A. I would say about fifteen minutes.

Q. During the entire fifteen minutes you were there was Feiner talking?

A. Yes.

[fol. 206] Q. Did you observe the crowd that was present?

A. Yes.

Q. How many people would you say were there?

A. Not in excess of twenty-five or thirty at the most.

Q. Where were these people with reference to the side-walk?

A. Well, there's some question in my mind as to what constitutes the sidewalk.

Q. Well, the area between the wall of the drug store which is along the west side of McBride Street and the curb stone, is all paved side-walk, isn't that so?

A. No, there's a part that is not paved—there is a strip down the middle that is paved.

The Court:

Q. There is a strip down the middle which is paved and which would be the side-walk, and then earth on either side?

A. I would say there's about two feet to begin with, maybe eighteen inches, and then four or five feet of concrete, and then earth again.

[fol. 207] The Court:

Q. Level with the sidewalk?

A. I think the sidewalk is very slightly above.

Mr. Greenberg:

Q. With reference to the area between the brick wall of the drug store and the curb stone on S. McBride St. where were the people located?

A. Along the building, lined up facing the street, most of them.

Q. Where were the others?

A. Scattered on the sidewalk.

Q. Did you observe people walking back and forth on the sidewalk?

A. Yes, I did it myself.

Q. Did you observe whether anyone had any trouble negotiating that distance?

A. I saw no one experience any difficulty.

Q. Did you see anyone walk out into the highway?

A. I did not.

Q. Did you at my request go down to the corner of S. [fol. 208] McBride and Harrison Streets and sketch out that area in question?

A. I did.

Q. Did you sketch out the location of the various stores and houses?

A. Yes.

Q. And did you measure the distance from the drug store to the curb?

A. I did.

Q. And did you place the Feiner car with reference to the drug store?

A. Yes.

Q. Did you measure the distance from the Feiner car to the drug store entrance?

A. Yes, I did.

Q. I show you defendant's exhibit (2) and ask you to tell us what that is?

Mr. Kelly: I might have the courtesy of seeing it first—well, go ahead it don't amount to anything anyway.

[fol. 209] The Court: Don't you think you ought to show it to Mr. Kelly?

Mr. Greenberg: He may see it.

Mr. Kelly: No, go ahead.

Mr. Greenberg:

Q. What is this?

A. This is a sketch I made last evening.

Q. Showing the location of various stores and houses, and the distances that you measured, are they substantially the same as they were on March 8th, 1949?

A. Yes.

Q. And did you measure the distance from the wall of the drug store to the west curb line of S. McBride Street?

A. Yes.

Q. What is that? What does that distance measure?

A. Slightly over eighteen feet.

Q. And did you measure the distance from where you [fol. 210] placed the Feiner car to the entrance to the drug store?

A. I did.

Q. What did that measure?

A. Roughly forty feet;

Q. And did you measure the distance from the side or the front of the drug store to the curb stone on the north side of Harrison Street?

A. Yes.

Q. What did that measure?

A. Approximately fifteen feet.

Q. Did you pace it off?

A. I measured it—eight and a half by eleven feet.

The Court:

Q. That would make the distance from the north curb to the place where the Feiner car was, fifty-five feet?

A. Yes sir.

Mr. Greenberg:

Q. And the distance from the wall of the Pharmacy to the curb would be about twenty feet?

A. Eighteen feet.

[fol. 211] Q. Did you also place on that sketch the location of Ben's liquor store?

A. Yes.

Q. And Mrs. Archie's residence?

A. Yes.

Q. And the approximate location of the two police cars?

A. Yes.

Mr. Greenberg: I offer the sketch in evidence.

Mr. Kelly:

Q. You said you were a Professor of Psychology?

A. No, an instructor.

Mr. Greenberg: I haven't finished questioning this witness.

Mr. Kelly: Well, I object to the offering of this exhibit in evidence—there's no proper foundation laid for it and further, this witness is not qualified to make such a sketch—he's no engineer, he claims to be a psychologist—this appears to be just some amat-urish scribbling and is not [fol. 212] an accurate plan of the location—from the looks of this juvenile attempt at sketching, I say you might better use your imagination, then attempt to utilize a nondescript record of this type.

Mr. Greenberg:

Q. Did you study engineering for some years?
A. Yes, four years, at the University of Utah and Purdue. I have a degree in engineering.

Mr. Kelly:

Q. And is this evidence of the work of a graduate engineer?
A. It's just a sketch.
Q. Were you taught to measure by paper or some other unit?
A. I was taught to use my ingenuity.
Q. Is there any proof that your ingenuity is as accurate as a measure? Did you measure the sheet of paper before you left?
A. No.
Q. So the paper could have been twelve inches long?
A. I don't know what you mean.

[fol. 213] The Court: I will sustain the objection on the grounds stated, and on the further grounds that I can see no purpose that would be served even though the paper was in any way accurate in locating any of the physical structures in that neighborhood. I can't see what purpose would be served by the use of this map or admitting it into evidence even if it was a paper that was prepared in the usual way. As it stands now, it's nothing but a crude childlike scroll.

Mr. Greenberg: I would merely like to state for the record that this, as testified to by the witness is an accurate report in sketch form of the area under discussion. He's testified to the pertinent matters, and we feel that this paper should be of some help to the Court in examining into the

facts of the situation that occurred here on March 8th. The cases have held that the nature of the area is important in deciding cases of this kind.

The Court: Well, you have the nature of the area, that [fol. 214] is important we know—but you have got everything that is in any way helpful in determining the issue here.

Mr. Greenberg: What's wrong with putting it in evidence?

The Court: What good is it? If you want to put in a map you should get something more accurate than that. The objection is sustained.

Mr. Greenberg:

Q. While you were there did you hear the defendant talking over the loud speaker?

A. Yes.

The Court:

Q. What did you hear him say?

A. I heard him say a lot of things—he spoke of the violation of civil rights—he spoke of the Ingraham case and the case of the veterans who fought in the south—he spoke of the Trenton six, and he spoke of this case in question of the meeting in Madison street school. He gave details on these things.

[fol. 215] Q. While you were there did the defendant call Mayor Costello a bum?

A. No.

Q. Did he call him a champaign- sipping bum?

A. He did not.

Q. Did he call Mayor O'Dwyer of New York City a bum?

A. No.

Q. Did he call President Truman a drunken bum?

A. No.

Q. Did he call President Truman a drunk?

A. No.

Q. Did he refer to members of the American Legion as Nazi Gestapo agents?

A. No.

Q. Did he tell the People to rise up in arms and fight?

A. No.

Q. Did he say rise up with arms and fight?

A. No, not while I was there.

Q. Did he make some reference at all to Mayor Costello? [fol. 216] A. Yes.

Q. What did he say about Mayor Costello?

A. He mentioned about his being down in Florida I believe, drinking champaign—he said he did not have time to look after the housing in Syracuse but he did have time to drink champaign.

Q. Did he refer to President Truman at all?

A. Yes, I think he did.

Q. In what connection?

A. The only reference I remember was I believe when he told how President Truman had assumed the duties of President Roosevelt.

Q. Whether or not, while you were there, he made any reference to the American Legion?

A. Not as such—I think he referred to the leaders of the American Legion.

Q. Did he make any reference to rising up and fight?

Mr. Kelly: I object to that as repetition.

[fol. 217] The Court: Yes, isn't that repetition, Mr. Greenberg? You've covered all that.

Mr. Greenberg: All right, I will withdraw it.

Q. While you were there did you make any observation of the crowd as to whether it was orderly or disorderly?

Mr. Kelly: I object to that as calling for a conclusion.

A. I observed people standing along the wall of the drug store and a few out a little farther, and there was absolutely no confusion or disorder.

Q. Did you see any persons walking in the Street?

The Court: You have asked him that before. He said he saw no one walking in the road or in the street.

Mr. Greenberg: I don't think I did your Honor. I would [fol. 218] like to have this witness testify as to the background of this meeting in this respect. I would like to have the witness testify to the cancellation of the permit for the school and the transference of the meeting to the Hotel Syracuse so the Court may have a complete story. I think the record should be complete as to the whole background of this meeting which was for the purpose of advising the people of the change in the meeting place.

The Court: Well, that is not material, is it? It's what transpired at that particular time and not what the background was or what the change in the plans were. I don't think that enters into the issue here. It's what this defendant said and what he did there, as I pointed out to you a day or two ago. I am not going into that again.

Mr. Greenberg: Well, we want to be of whatever assistance we can to the Court.

[fol. 219] Mr. Kelly: I object to it as immaterial and irrelevant and has no bearing on what took place over there. I don't see how reference to the absence of Mayor Costello from the City, or Truman succeeding Roosevelt or why they were having some difficulty in finding a place for a meeting, I don't see how that is material.

The Court: Well, you have my ruling on that—I don't think giving the complete background including all these irrelevant things is material. I am interested in what occurred at the corner of S. McBride and Harrison Streets on the night of March 8th. I don't think what some other people may have done in regard to changing the place of the meeting, or that someone was going to speak at some other meeting later in the evening—I don't think those facts are either material or helpful.

Mr. Greenberg: Well, I make the offer of proof, your Honor.

[fol. 220] The Court: I will rule that that type of proof is not material.

Mr. Greenberg: Exception.

Mr. Greenberg:

Q. Were you present at the meeting at the time the Police Officer came across the Street?

A. No.

Q. But during the fifteen minutes you were there, did any of the Police officers come across the Street?

A. No, not to my knowledge.

Mr. Greenberg: That is all.

[fol. 221] Cross-examination.

By Mr. Kelly:

Q. You were not there when the meeting started?

A. Yes, I was.

Q. Then you went away?
A. Yes.
Q. And came back, did you?
A. Yes.
Q. What took place while you were gone you have no knowledge of at all?
A. Except what I heard.
Q. No, do you know what took place of your own knowledge?
A. No, not when I wasn't there.
Q. You don't know what the officers did from the time you left until you came back?
A. I was there when the Officers came across the Street.
Q. I did not ask you that. You don't know what the officers did from the time you left the meeting until you returned?
A. No.
[fol. 222] Q. Or what was said by anyone during that period, you don't know, do you?
A. That is correct.
Q. Then there came a time after you left the meeting that you returned?
A. Yes.
Q. Then you left again?
A. Yes.
Q. And what took place after you left again you don't know?
A. No.
Q. You don't know what was said or what was done during that time?
A. No.

Mr. Greenberg: That is all.
The Court: I will adjourn until tomorrow morning.

[fol. 223] The People vs. Irving Feiner

Proceedings: May 6, 1949

Mr. Greenberg: If the Court please, we had quite a discussion yesterday about the kind of testimony the character witnesses were qualified to produce, and at that time I was confined by the ruling of the Court to questioning the char-

acter witnesses only as to their knowledge of the reputation of the defendant for truth and veracity. I have since that time, examined into the law on the subject and I find that the cases in New York State, some decisions of the Court of Appeals are that a character witness in a criminal case is competent to testify as to the general good character of the defendant and also as to his reputation for peace and quiet.

The Court: I am familiar with those cases. I think that I was very liberal in my rulings and I permitted your witnesses to spread out and cover any subject that you wanted [fol. 224] to talk about.

Mr. Greenberg: I don't think you understand my remarks. The point is that these witnesses were confined to testifying as to the reputation of the defendant for truth and veracity.

The Court: The questions could have been asked in regard to the other subjects you mentioned.

Mr. Greenberg: I did, and they were denied. I asked whether the witnesses were familiar with the reputation of the defendant on the campus——

The Court: No, I am not going into that any more. I will adhere to the ruling I made yesterday. I permitted your question covering the campus and even the class room. I even permitted the witnesses to testify when they knew nothing of the reputation of the defendant in the community.

[fol. 225] Mr. Greenberg: Yes, but your Honor, under your ruling the questions were confined to truth and veracity.

The Court: Have you got some witnesses now?

Mr. Greenberg: Yes. But in addition to these witnesses I would like to ask that the District Attorney stipulate that those witnesses who were called yesterday, and are not in Court today, would have testified if they were asked and if they had been permitted to answer as to the general reputation of the defendant on the campus of Syracuse University, that they would have testified that it was good, and as to his reputation for peace and quiet, that that was good.

The Court: Mr. Greenberg, you never mentioned peace and quiet in any of your questions yesterday; now you can't go at it in a piecemeal fashion.

[fol. 226] Mr. Greenberg: Well, I certainly asked as to his good character, and surely that would include peace and quiet.

The Court: Well, I am adhering to my ruling as of yesterday.

Mr. Greenberg: I take a general exception to all of the rulings in that respect.

The Court: Very well.

[fol. 227] MARGUERITE J. FISHER, called to the Stand by the Defense; sworn, testifies as follows:

Mr. Greenberg:

Q. Dr. Fisher, where do you live?
A. 726 Euclid Avenue.
Q. In the City of Syracuse, New York?
A. Yes.
Q. Are you associated with Syracuse University?
A. I am.
Q. In what capacity?
A. As Associate professor of Political Science.
Q. And how long have you been associated with Syracuse University?
A. Since 1933.
Q. Are you familiar with the defendant, Irving Feiner?
A. He's a student of mine.
Q. Had you known him previously?
A. I have known of him before, but not personally.
Q. For how long a period has he been a student of yours?
A. Since the first of February, 1949.

[fol. 228] Q. Are you familiar with the reputation of the defendant on the campus of Syracuse University?

Mr. Kelly: I object to that as not being proper in form.
The Court: Objection sustained.

Mr. Greenberg:

Q. Are you familiar with the reputation of the defendant according to the speech of the people on the campus of Syracuse University?

Mr. Kelly: Objection. The question is still improper in form.
The Court: Sustained.
Mr. Greenberg: Well, I don't know what the Court wants.

Mr. Kelly: If he would include what he had in the first question with the second question it would be all right.

[fol. 229] Mr. Greenberg:

Q. Are you familiar with the reputation of the defendant on the campus of Syracuse University according to the speech of the people?

Mr. Kelly: As to what. I object to it—it's still improper in form.

Mr. Greenberg: As to reputation. I am entitled to ask the general question.

The Court: Objection sustained. I tried to help you out all I could yesterday—you will have to figure it out for yourself at this time. Objection is sustained.

Mr. Greenberg: Exception.

Q. Dr. Fisher, are you familiar with the reputation of the defendant for peace and quiet on the campus of Syracuse University according to the speech of the people in that area?

A. Yes.

[fol. 230] Q. What is that reputation?

The Court:

Q. Is it good or bad?

A. It's good. I know of no evidence to indicate that it's not good?

Q. You say the defendant's reputation is good?

A. Yes.

Mr. Kelly: I object to that as repetition.

The Court: Oh, I will allow it.

Witness: There's been nothing to indicate that his reputation is not good.

Mr. Kelly: That is not responsive—he hasn't asked her any question.

Mr. Greenberg: I submit the witness is entitled to testify as to a negative as well as a positive answer.

The Court: Well I thought she testified that his reputa-

[fol. 231] tion was good. It is such a simple question there should not be any argument about it. Ask the question again.

Mr. Greenberg:

Q. Dr. Fisher, do you know whether or not that reputation is good or bad?

A. Yes.

Q. Is it good or bad?

A. It's good.

Q. Are you familiar with the reputation of the defendant on the campus of Syracuse University——

Mr. Kelly: I object to the question in that form, and I object on the further ground that it is repetition.

The Court: Sustained.

Mr. Greenberg: That is all.

Mr. Kelly: No cross examination.

[fol. 232] Dr. Stuart Brown, recalled to the stand by the defense.

Mr. Greenberg:

Q. Are you familiar with the reputation of the defendant according to the speech of the people on the campus of Syracuse University?

Mr. Kelly: I object to it as improper in form.

The Court: Well, there isn't any question about it; the objection is good. I pointed out to you yesterday the form of the question that should be used Mr. Greenberg, and I finally asked the question for you. But, I will, nevertheless, overrule the district Attorney's objection.

Mr. Greenberg:

Q. I will ask you again, are you familiar with that reputation?

Mr. Kelly: I object again—the question does not refer to any particular thing.

[fol. 233] Mr. Greenberg: I maintain under the Court of appeals ruling that the witness is entitled to testify as to the general reputation of the defendant.

The Court: No, the question is not proper, even with that thought in mind.

Mr. Greenberg:

Q. Is that reputation good?

A. Yes.

Q. Are you familiar with the reputation of the defendant on the campus of Syracuse University for peace and quiet?

Mr. Kelly: I object on the same grounds as stated previously.

The Court: The objection is good but I will overrule it. Let him answer the question.

A. Yes.

Mr. Greenberg:

Q. Is that reputation good or bad?

A. It's good.

Mr. Kelly: No cross-examination.

[fol. 234] Benjamin Tabachnick, called to the stand by the defense, sworn, testifies as follows:

Mr. Greenberg:

Q. Where do you live?

A. At the present we have a temporary address in New York City, we just moved there; that is 2522 Oliver Avenue, Bronx.

Q. Where do you live here in Syracuse?

A. 1116 E. Genesee Street.

Q. Are you a student at Syracuse University?

A. Yes.

Q. You are in what year there?

A. My third year.

Q. Were you present the night of March 8th, 1949, at the corner of S. McBride and Harrison Streets while the defendant was making a speech?

A. Yes.

Q. When did you arrive there?

A. I am not sure as to the exact time, it must have been about six o'clock. I drove up in the car which had the loud speaker on it, and parked about forty feet from the corner.

[fol. 235] Q. Did you thereafter leave the scene where the defendant was speaking for a short time?

A. Yes, I went around the block on Harrison St. to the first street east of McBride, and came back shortly afterwards and walked south on S. McBride Street to the corner.

Q. Was the defendant already speaking at the time you got there?

A. Yes.

Q. How long did you remain at the scene of the meeting after that?

A. About twenty or twenty-five minutes.

Q. Was the defendant speaking all during that time?

A. Yes.

Q. You heard about twenty-five minutes of his speech?

A. Yes.

Q. Did you hear everything he said?

A. Yes.

Q. Will you tell us where you were standing during the course of his talk?

[fol. 236] A. Well, as soon as I came down S. McBride Street I walked to the corner of Harrison to the place where the defendant was speaking. I moved around—I did not stand in any one place.

Q. Were you located somewhere between the loud speaker and the corner?

Mr. Kelly: I object to that as leading—let the witness tell what he did.

The Court: Yes, its leading—can't you ask him the questions without leading, Sid?

Mr. Greenberg: I don't think I am leading him your Honor. I think the witness should be allowed to answer the questions as he would like to.

The Court: He will be given every fair opportunity to answer the questions if you will just let him do it. Mr. Kelly is objecting to the leading questions you are asking. Why don't you ask him where he was?

[fol. 237] Mr. Greenberg:

Q. Tell us where you went with reference to the Speaker when you first got there?

A. I went to within ten or fifteen feet of the corner where a gentleman handed me some leaflets which he asked me to

distribute and I walked to the east side of S. McBride Street and distributed them. Then I walked across the street and stood against the wall of the drug store, and then I moved after a short time into the center of the side walk.

Q. Had you been listening to the defendant all during this time?

A. Yes.

Q. Did you make any observation about the size of the crowd?

A. Yes.

Q. How many people would you say were there on that corner while he was talking?

A. About twenty-five; never more than thirty. People would come and people would go, but the number remained pretty constant.

[fol. 238] Q. As to the weather on that night?

A. It was cold.

Q. As to pedestrians walking back and forth on McBride Street, did you see any walking back and forth?

A. Yes, I did myself.

Q. Did you see any pedestrians walking into the street?

A. I saw one person who did.

Q. As to whether or not there was room on that street for pedestrians to walk back and forth?

Mr. Kelly: I object to that as calling for a conclusion and an operation of the witness's mind.

The Court: I don't think that is a proper question to ask him.

Mr. Greenberg:

Q. You say there were about twenty-five or thirty people there?

A. Yes.

Q. Where were they standing with reference to the speaker?

[fol. 239] A. Most of them were standing against the wall of the drug store.

Q. How many were standing on the sidewalk?

A. About ten I would say.

Q. And you say the car was parked about forty feet from the corner?

A. Yes.

Q. And these people were standing between the car and the corner?

A. Yes.

Q. Did you observe anything as to the conduct of the crowd?

A. Yes.

Q. What was that?

A. Well, the crowd was quiet as they made no outcries of any sort—there was no disturbance of any kind.

Q. Did you hear anything that could be classed as muttering or angry muttering on the part of the crowd?

A. No, I did not.

[fol. 240] Q. Did you observe any police officers in the vicinity?

A. Yes, I did.

Q. Where were they located?

A. I first noticed a police car parked on the east side of McBride Street. It pulled up as I finished handing out the leaflets. Later I noticed another Police car pull up, and I saw the second policeman talking to the one who had arrived first. He pulled up and parked and then got out of his car and went over to the other police officer, and he stood there talking to him, and much later, I wasn't looking at them steadily, I saw them cross the street.

Q. How much later did they move their position if they did?

A. About ten minutes after I saw them talking to each other I saw them cross the street and come toward the speaker.

Q. Did you observe their path from the car to the speaker?

[fol. 241] A. Yes.

Q. Will you describe the manner in which they came across the street?

A. They just walked across the street and went directly up to the speaker.

Q. Did they go through the crowd at all?

A. No; I was standing at that time in what would be the front row, and there was about ten feet between myself and the speaker, and the officers came on the sidewalk and stood in front of him.

Q. While you were there at that time did you hear any members of that audience talk to the Police officers?

A. No, I did not.

Q. Were you standing where you could hear them if any such conversation did take place?

A. I did not see anyone approach the police officers until they got over there by the speaker, and then the crowd gathered around them.

[fol. 242] Q. Had the crowd done that before the Police officers came over?

A. No.

Q. While you were there did you hear the defendant call Mayor Costello a champaign- sipping bum?

A. No.

Q. Did he call him a champaign- sipping bum?

A. No.

Q. Did you hear the defendant call Mayor O'Dwyer of New York City a bum?

A. No.

Q. Did he call him that?

A. No, he did not.

Q. Did you hear him call President Truman a drunken bum?

A. No.

Q. Or did he call him a drunken bum?

A. He did not.

[fol. 243] Q. Did he refer to the members of the American Legion as Nazi Gestapo Agents?

A. No.

Q. Did he say in words or in substance that the People should rise up with arms and fight?

A. He did not.

Q. Or that the people should rise up in arms and fight?

A. No.

Q. Did he make certain references to Mayor Costello?

A. Yes. Mr. Feiner was talking about the fact that Mr. John Rogge was not permitted to use a school here in Syracuse for a Civil Rights meeting. He said that he was intending to talk about civil rights, and that civil rights meant decent homes and things of that nature, and he said that Mayor Costello had time to go down to New Orleans and drink champaign-, but that he did not have time to look after the interests of the people in the fifteenth ward— And he said also, that when Costello returned to the City the first thing he did was to cancel the civil rights meeting.

[fol. 244] Q. What reference did the defendant make to President Truman?

A. He said that President Roosevelt had appointed John Rogge to prosecute in the Nurnberg War trials, and then Roosevelt died and that man, Truman came in.

Q. Did he make any reference to the members of the American Legion?

A. No he did not—he made reference to the leadership of the American Legion.

Q. What did he say in that respect?

A. He said that the leaders of the American Legion say that they speak for all the veterans and he said, I am a veteran and they are not speaking for me.

Q. Did he make some reference to rising up and fighting?

A. Yes.

Q. What was that?

A. He said that the People in the fifteenth Ward should [fol. 245] rise up and fight for their rights and fight for decent housing and for their civil rights and the best way they could do that was to go down to Hotel Syracuse, black and white alike and arm in arm, and go up the elevator in the hotel arm in arm and hear John Rogge speak.

Q. And was that the only reference he made to that word, arm?

A. Yes.

Q. When the Police officers came across the street did you observe them giving any instructions to the crowd?

A. No.

Q. And were you close enough so you could hear the conversation between the Officer and the defendant?

A. Yes.

Mr. Kelly: I object to that as repetition.

The Court: Over-ruled. He's already answered anyway.

[fol. 246] Q. What happened when the officers got up to the speaker?

A. As soon as the officers formed themselves in front of the speaker I moved with the crowd and was right in front —I finally stopped just slightly behind the box the speaker was standing on.

Q. What was the conversation that ensued?

A. First the officer said something that I could not hear —he said it low and the speaker kept right on talking, and then the officer spoke more sharply and said something to the effect, "all right, bud, its time to break it up," and the speaker stopped then and looked down at the Officer and

said, "what?" The Policeman then repeated his statement and the speaker said, "why?" And the Policeman said, you are going to have to come along with us, and the Speaker said, what's the charge? And the Policeman said, illegal assembly—then the speaker said nothing for about five seconds, and the Policeman said, are you going to come along and the Speaker said, sure I will come along, and he stepped down from the box and said to the people, the law [fol. 247] has arrived and will now take over.

Q. How long did that conversation take?

A. In the vicinity of a minute, not more than that.

Q. Did the defendant at any time tell the Police in words or in substance that he was refusing to obey their instructions?

A. No, he did not.

Q. Was most of the defendant's conversation devoted to finding out on what basis the Police officer was making the demand that he cease speaking?

A. Yes.

Q. Did the Police officer say anything to the defendant about the size of the crowd?

A. No, I don't remember. I did not hear anything like that.

Q. Did the Police officer say anything to the defendant about blocking traffic?

A. No.

[fol. 248] Q. Did you observe the number of loud speakers on the car?

A. Yes.

Q. How many were there?

A. Two.

Q. You had driven up in the car originally yourself?

A. Yes, and I helped put the loud speakers on.

Q. And did you observe the loud speakers there at the meeting, that there were still only two?

A. Yes, sir.

The Court:

Q. How many of you boys were identified with the program there that night?

A. There may have been between five and ten; not too many because quite a number of them were down at Hotel Syracuse— I would say there may have been about ten there.

Q. Are they included in the group of twenty-five that lined this wall of the drug store?

[fol. 249] A. They formed part of it at one time, but not all at one time. Many of them came for a short time and then left.

The Court: All right.

Mr. Greenberg: That is all.

[fol. 250] Cross-examination.

By Mr. Kelly:

Q. You don't know what was going on at the meeting while you were walking around the block, do you?

A. No.

Q. You don't know what the police did at that time?

A. No.

Q. You did not mistake that corner for University college when the exodus came from the University did you?

A. I don't understand that question?

Q. Did you mistake that corner for the University college when this exodus of University students came off the hill?

A. I did not notice any exodus.

Q. Well, there was quite a parade wasn't there, all going to one spot—or is that one of the out-patient lectures——

Mr. Greenberg: I object to that as improper.

[fol. 251] The Court: Sustained. I don't think that question is very clear.

Mr. Kelly:

Q. You don't know anything of what happened when you were not there at that meeting, do you?

A. Of course, not. No.

Mr. Kelly: That is all.

The Court:

Q. Do you belong to the Young Progressives of America?

A. Yes.

Q. What's your idea of the meaning of "Truth", is it a fixed term or a relative term?

A. According to the Dictionary, truth is what is, and what is only changes as the observation of what is changes.

Q. Truth changes as your observations of it changes?

A. Well, it was considered true perhaps at one time that bactoria generate spontaneously, but that truth has [fol. 252] been changed now. Many things which we have held to be the truth in the past have proved to be false.

Q. You mean that ideas that have been held as true in some age or generation of time may undergo a change?

A. Yes.

Q. Well, that is not a question of whether or not truth is a fixed quantity or quality—that relates to ideas, doesn't it? Professor Engler testified yesterday that truth is a relative matter so far as the social sciences are concerned.

A. Well, the social sciences are made up of ideas and not facts—I was only using the dictionary definition of truth.

Q. It's your position that it's simply ideas that change?

A. Yes, what is, is. What is, doesn't change.

Q. Truth is considered to be more or less relative in certain sciences; what is your judgment about truth, the [fol. 253] meaning of it in the science of the law?

A. In the law, truth is modifiable by the decisions that are handed down—the Supreme Court in the Dred Scott case handed down a decision which was later modified. You find in many legal cases that decisions are given upon trial and afterwards on appeal to some other court the decision is reversed.

Q. As to an oath, that is the giving of an oath or the administering in a Court of an oath to a witness to swear to tell the truth—is there anything variable about that, or is that something that has different meanings under different circumstances?

A. No, because the witness is testifying to what is; what is observable by him.

Q. The witness is presumed to be testifying to the truth and is not influenced by any of these relative ideas?

A. Yes, he's testifying to what is; what he saw, or what he observed.

[fol. 254] The Court: All right.

Motion to Dismiss

Mr. Greenberg: The defendant rests. At this time I would like to make my arguments if the Court please.

On behalf of the defendant I would like to move for a dismissal of the information on the grounds that the people have failed to prove beyond a reasonable doubt that the crime charged in the Warrant and Information has been committed by the defendant.

The defendant has been charged under subdivision 2 of Section 722 of the Penal law of the State of New York with causing a crowd to congregate and thereby causing a breach of the peace or causing certain facts or circumstances to develop which would lead the Police to believe that a breach of the peace was imminent.

Now, there's nothing in the testimony up to the present [fol. 255] time that shows that anything untoward happened at that meeting which took place on the corner of S. McBride and Harrison Streets on the night of March 8th.

It is my contention that if the defendant is convicted in this case on the evidence that has been presented here today and yesterday, that it will become impossible to hold a meeting on the streets of the City of Syracuse from now on; and, giving the People's case the benefit of every doubt, the only thing they have produced in their testimony, and this has been combatted by the witnesses and the defendant, some of whom are completely impartial about this matter—the most that the People have shown by their witnesses, the two Police officers, was that there was some muttering in the crowd. And I fail to see how you can determine either the volume or the extent of it that would be necessary to lead to a breach of the peace or which would tend toward a breach of the peace.

[fol. 256] The People have testified by their leading Police Officer, Officer Flynn that it took about two minutes for the defendant to get off the stand at the request of the Officer. I don't think it is unreasonable for the defendant to spend two minutes to question the Police Officer's request and to determine whether the decision of the Police or the instructions of the police were reasonable.

I think that in order to be obeyed, the instructions of the Police must be reasonable, and I certainly don't think it's unreasonable to spend two minutes to decide whether they are or not. The witness closest to the scene said it

took not more than a minute. I maintain your Honor, that the Police officers have a duty to see to it that there is law and order in the community, and that the police are not required to wait until there's a disturbance or a riot before taking certain action, but I don't believe it's the duty of the Police in mere anticipation of disturbances to go around making indiscriminate arrests.

Officer Flynn said he approached the Stand, not with the idea of arresting the defendant, and this was after [fol. 257] the defendant had made these alleged remarks or statements, and after the People had been forced out into the highway, and I repeat, finally the Officer approached the stand, not he says, with the idea of arresting the defendant; so apparently because it took the defendant two minutes to make up his mind, they decided they were going to arrest him.

Now, I claim, what the Police officers should have done if they were concerned about peace and quiet, they could have told Mr. Feiner, "I am afraid there's going to be a disturbance and I am asking you to stop the meeting," but they did not do that.

The Court: You take the position that the officer when he crossed the street on his way to where the defendant was speaking; that the officer, on his way across the street did not have in his mind to arrest the defendant that, that is a conclusion here. What I have in mind is this—it's possible, is it not, that a police officer may witness certain [fol. 258] acts and hear certain talk that would or could be a basis for a charge of disorderly Conduct. He might be a very patient type of officer who, notwithstanding all that had transpired before, decided after crossing the street, and by the use of his good judgment that the arrest was justifiable.

I don't believe the fact that the officer testified that he did not have in mind to do anything about this meeting, so far as making an arrest was concerned, when he was crossing the street or when he first spoke to the defendant is conclusive. That is my position.

Whether or not the arrest was proper depends, not on what the Officer had in his mind, but it depends on what action took place there and upon the evidence that has been presented here as to what actually took place.

Annexed hereto and made a part hereof are the Minutes upon the hearing of the case and a certified copy of conviction.

Wm. H. Bamerick, Justice of Special Sessions.

May 10, 1949.

[fol. 290] In County Court of the County of Onondaga

The People of the State of New York, Respondent

vs.

Irving Feiner, Appellant

Opinion—August 5, 1949

(Unreported)

Breed, J.:

This is an appeal from a judgment convicting the appellant of a violation of Section 722 of the Penal Law of the State of New York in the Court of Special Sessions of the City of Syracuse. The appeal is taken upon the following grounds: 1. That the People did not prove beyond a reasonable doubt that the defendant committed the acts charged; 2. That the conviction of the defendant was invalid as an abridgement of the freedom of speech and of assembly guaranteed by the First and Fourteenth Amendments of the Federal Constitution and Article 1, Section 8 of the State Constitution; and 3. That the sentence of the Court was excessive. Section 722 of the Penal Law reads in part as follows:

> "Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committeed the offense of disorderly conduct:
>
> [fol. 291] "1. Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior.
>
> 2. Acts in such manner as to annoy, disturb, interfere with, obstruct or be offensive to others;
>
> 3. Congregates with others on a public street and refuses to move on when ordered by the police;"

Mr. Greenberg: I would agree that it's the duty of the Court and not the Police to make the determination as to whether or not the instructions of the Police we- reasonable. [fol. 259] That is to say, there have been cases; I can cite your honor cases on that score in which the Courts have held that the reasonableness of Police orders is something for the Court to determine from the evidence. Because a policeman says in his opinion there was going to be a disturbance, that is not controlling—and this issue arises in those cases in which the police have made such determination. According to the people's own witnesses, up to the point where the Police officers crossed the Street and Officer Flynn requested the defendant to step down from the box, it was there opinion that a disturbance was not imminent.

I claim it's significant that a situation like that developed and no effort was made by the Police Officers to stop the meeting in the interests of peace and quiet. I think it's also significant that the People have been unable to produce anyone other than the two police officers as witnesses. They claim there were seventy-five people there, and this speech must have been heard over a wide area, yet the Peo- [fol. 260] ple have been unable to bring into Court any witnesses but the Police officers.

They claim in their bill of particulars that the loud speakers made unnecessary loud noise, and that the Police received information that a disturbance was going on——

The Court: Well, there's no proof to that effect. The Officers got a call and they went down there. I think your objections prevented the disclosure of these things you are talking about now.

Mr. Greenberg: But your Honor, if they wanted to prove that people were being disturbed they could have brought in the man they claim approached the Police Officer and told him to do something about it or he would. And if that man was talking in such a frame of mind it seems to me that he was the one that should have been arrested.

[fol. 261] Mr. Kelly: Counsel knows that any influence on the part of either side to call witnesses is improper and should not be a subject of comment.

The Court: You haven't objected to what the Officers were ready to testify to in regard to the circumstances attending

the complaint, and which resulted in the two officers being dispatched to this corner?

Mr. Greenberg: My question is, why did they not produce this man in Court?

The Court: Because you objected to it.

Mr. Kelly: It wasn't necessary. I am under no compulsion to call anyone I do not wish to call. You also have that privilege Mr. Greenberg to call or not to call certain witnesses the same as the People, and you have no right to comment on it.

[fol. 261a] Mr. Greenberg: I think I have the right to comment when some unknown people's remarks are brought out in the testimony.

Mr. Kelly: Then why didn't you bring them in—that's your privilege.

Mr. Greenberg: We don't know who they are. If we could find them we would call them.

I wish to cite the case of "The People vs. Smith, 295 New York——

The Court: That case was cited in your memorandum.

Mr. Greenberg: Yes, and in that case the Court held that the defendant could not be convicted of Disorderly Conduct.

The Court: Mr. Greenberg, I except those principles—I have read all those cases you cited, so now we get right back [fol. 262] to the motion to dismiss which you made a couple of days ago, where I told you that the points that are raised in those cases are not appropriate points in this procedure. Let me repeat to you again, it isn't the fact that a sound truck was used—we don't question that; it isn't the fact that the crowd, so far as numbers are concerned, gathered at this point. That is something the law holds is perfectly proper.

Mr. Greenberg: What then is the question in this proceeding?

The Court: The question here, is what was said and what was done? And it doesn't make any difference whether whatever was said, was said with a loud speaker or not. There are acts and conduct an individual can engage in when you don't even have to have a crowd gathered around which would justify a charge of disorderly conduct. The question is, what did this defendant say and do at that par- [fol. 263] ticular time and the Court must determine

whether those facts, concerning what the defendant did or said, are sufficient to support the charge.

Mr. Greenberg: The burden of proof rests upon the People to prove beyond a reasonable doubt that the defendant is guilty as charged. We have produced witnesses here whose testimony is directly opposed to that of the Police Officers. There is a sharp conflict between the testimony of the witnesses for the People and the defendant. We did produce at least one witness who testified to being there during the whole time and that is a matter of proof the Court should take into consideration.

The Court: Which witness is that?

A. Mrs. Archie.

The Court: The lady who was sitting in her window?

[fol. 264] Mr. Greenberg: Yes, and I say further, that even assuming that the plaintiff made statements with which he is charged, that no crime has been committed.

From time immemorial there has been a steady barrage of name calling from one side to the other. History is filled with it. If everyone who was called a name in public life brought the name-caller to law, as between the common citizen and the Public figure, I venture to say that the jails of this Country would be pretty substantially full. Back to the days of Andrew Jackson——

The Court: Let's confine ourselves to this particular day.

Mr. Greenberg: Well, I would like to go into this if the Court please—it's important. Lincoln was called a copperhead; and the names they called Franklin Roosevelt, I could talk a whole day on that—they said he was crazy and that he was a communist. President Truman called someone an [fol. 265] S.O.B. and John Walsh appeared before a hearing of the Common Counsel in this city, and said, "we are going to drive these political punks right out of office—I have several more references here which——

The Court: I think that's enough. You have gone all over that before Mr. Greenberg.

Mr. Greenberg: Well, what I want to say is that these things may be in bad taste but there's a sharp distinction to be drawn between something that is bad taste and conduct that may be considered to be Disorderly.

The Court: I fully understand your views on that subject, and I say again, we have gone all over that before, so let's go on to the other points now.

Mr. Greenberg: All right. The police have charged that by reason of the crowd that certain persons were forced off [fol. 266] the sidewalk and on to the public highway. I cite the case of People vs. Dixon, page 182, and in that case the Court said, they were guilty we may concede of bad manners——

The Court: That is one of the cases you cited the other day—and that, in and of itself, the fact that certain persons had to walk out into the highway; that fact would not be the basis of the charge. But that fact, taken into consideration with the numerous other incidents that occurred, might make up one of the elements of the disorderly conduct. Now I have read all the cases you are citing—so why waste time unless you have some other points to your motion.

Mr. Greenberg: The People vs. Downs that is another case and 168 Misc. which should be read by your honor as a matter of fact. The defendants were walking along a highway stating that religion is a snare and a racket and making [fol. 267] remarks about the Catholic Church.

The Court: That relates to the Jehovah's Witnesses. I have read them all and I fully understand the principles you are speaking about.

Mr. Greenberg: I think those things are important and we ought to bear it in mind. Now I would like to recite this quotation——

The Court: What is it, poetry?

Mr. Greenberg: No, it's from the Rev. Doctor Fosdick——

The Court: Then we won't go into that any further. I know he's a very estimable clergyman—but I don't think what he says has any particular bearing on the question this Court has got to determine. I will eliminate that.

[fol. 268] Mr. Greenberg: I would like to include all of my arguments and the cases I cited on my motion to dismiss and ask respectfully to include those statements made at that time.

The Court: I have given you quite a bit of latitude, Mr. Greenberg, and I think you ought to conclude at this time.

Mr. Greenberg: There may be something I have left out.

The Court: Well, you stated yourself very fully on that motion in regard to every phase of the case.

Mr. Greenberg: I would like to incorporate my argument on my motion to dismiss.

The Court: No, no, not today.

Mr. Kelly: The Court is familiar with what my argument [fol. 269] would be. I am a little shy on poetry and have no desire to read the Congressional record.

The Court: All right, I will reserve decision until 2:00 P.M. today.

[fol. 270] People vs. Irving Feiner.

Proceedings: 3:00 P. M., May 6, 1949.

ORDER DENYING MOTION TO DISMISS

The Court: The matter before the Court is Mr. Greenberg's motion. The motion is denied.

Mr. Greenberg: Exception.

The Court: Have you anything more to offer, Mr. Kelly?

Mr. Kelly: No, I have no further proof to offer your honor.

DECISION

The Court: Mr. Feiner, you have been charged with the offense of Disorderly Conduct, arising out of the meeting on the corner of S. McBride and Harrison Streets on the night of March 8th, 1949, which was addressed by you over a loud speaking system.

Now, you have had a fair trial; you have been ably defended by good counsel, that is a right that is afforded every- [fol. 271] one in this Country, regardless of his position or his race or situation in life. That is a priceless heritage; that is something that is foreign to some of these ideologies in some of the places in this World, and that some folks in this Country seem to like and seem to endorse.

Now, awhile ago, I think on the 26th of March, a very estimable citizen in this town; a man who commands the respect of every individual who has ever had any contact with him or who knows anything about him, delivered a talk here in town at a certain place, and I would like to summarize briefly what that out-standing citizen of this town had to say. He spoke on the freedom of Speech; something that is prized very highly; something that is talked about very generally nowadays. That too, is one of the priceless heritages we have in this country, and which we would like to preserve. It is something our forefathers fought and bled for, and they set up this system of equal rights for [fol. 272] everyone, including you and including me; and

on that subject, this man that I have spoken to you about, had this to say:

"The importance of Freedom of Speech, for which our founding fathers fought and died for is a very very important right. "Freedom of Speech, he said, "is a right which must not be abused in Public any more than in private. Our citizens should be protected and should be permitted to exercise their civil liberties, and Freedom of Speech is a very precious liberty. However, when these liberties are abused they endanger our national security. Then this, Freedom must be controlled."

Continuing, he said something about Communism, the mention of which has been avoided here, so I will omit that.

He maintains that people who advocate change by violence, and who divide a nation to conquer, and pit man [fol. 272a] against man, and class against class and race against race and color against color, and religion against religion, should be denied the right of freedom of speech.

Now, the man who delivered that talk; this outstanding citizen is Rabbi Benjamin Friedman, and he delivered that talk in the Temple of the Society of Concord in this City, of which he is the head.

I think that is a good, sound, sensible philosophy. I think our citizens should be permitted to exercise those liberties that Rabbi Friedman spoke about; the freedom of speech and the numerous other freedoms you have heard a good deal about, subject however, to some regard for the rights of others; subject to other people's convenience; subject to other people's wishes.

Even though what I am saying may sort of weary you, as the last gesture you made would seem to indicate, it may be that what I say has no meaning whatever for you. But [fol. 273] these thoughts and these ideas are so important to the welfare of the country, that even though what I say wearies you, I am going to keep right on saying it.

I say that this freedom must be subject to regard for the rights of others and to the reasonable exercise of the Police powers which is recognized in our system of Government as an important adjunct to the regulation of our affairs; and then again, to the use of whatever reasonable restraint the law imposes.

In other words, we can't have absolute rights; we can't have the absolute right to go out and use the Streets or to enjoy any of these freedoms that so many people talk about

today. No, it's not an absolute right. Every right and law must be exercised with some regard to the rights of others.

Now, on the 8th day of March of this year, you were addressing a number of People on the Corner of South McBride and Harrison Streets, on the evening of that day. As [fol. 274] I gather it, you were talking about a meeting that was to be held at some other place, and which was to be addressed by a man named John Rogge.

Mario Rossi, said in his column in the Post Standard, that this man, John Rogge, was connected with a very important department of the National Government at Washington. He was in the inner circle, and while remaining there, everything was all right. He was agreeable to the program; he found nothing wrong with the way the affairs of this government were conducted. But the minute he got out of the Government, and he was outside of the circle, then it was something different. As long as Rogge could not be in the circle then, according to Rossi, there was to be no circle.

So, you were talking over the loud speaker on this evening in question when a call, according to the evidence came to Police headquarters, as a result of which, two police officers [fol. 275] were dispatched to the point where you were speaking. And after arriving on the scene there, the officers made certain observations, and according to their testimony, they spent some twenty minutes or twenty-five minutes more or less, (that is not so important) listening and observing.

Now there is no question about the right of any citizen, including yourself, to use a sound truck for the purpose of delivering an address, and I have no dispute or differences with any of the decisions of the United States Supreme Court or any court on that subject. You had a perfect right to appear there and to use that implement, the loud speaker. You had a right to have it in the street. There is no question about that. But bearing in mind what I said a few minutes ago, quoting Rabbi Friedman; that right has to be conducted within certain restraints, and subject to reasonable police regulations and the exercise of police power, to see that no Disorderly Conduct arises, and that the rights of others are [fol. 276] not violated.

The Officers say, and they so testified that they stood there during this period of time on the opposite side of the street

and they heard you call Mayor Costello, and Mayor O'Dwyer and President Truman the names you heard testified to.

Now, it is conceded by your Counsel, that that might be considered bad taste; that might be disrespectful, even though, so far as the exercise of that particular right is concerned, to call people names, we will assume you had a right to do it. I don't think that was the sensible or the proper or the decent way in which a good citizen should operate. Of course that is disputed by you, but I am inclined to go along with the Officers, because what they say is in so many respects so close to what your witnesses have testified to that I am impressed by that fact.

The manner in which you spoke of the American Legion, that too, was something so unnecessary, and so uncalled for, [fol. 277] and so disrespectful toward a great organization that has a great record, and has great men in its ranks, and which urges and fights that we maintain this system of government that some other people are so ready to destroy.

I don't think, even though you were within your strict legal right, in addressing the American Legion the way you did, I don't think that is an attribute of good citizenship.

Now, the Officers say there were other things; they say there was a crowd of seventy-five or eighty people gathered there; that the space between the curb and the wall of the building was so taken up with this number of people that it was next to impossible to find free passage; that it was necessary for people attempting to pass up or down on that side of the street to go out into the roadway where vehicular traffic made it appear to the officers that some situation might result from that, whether dangerous or what, they [fol. 278] noted that. They also came across the street, as they testified, and mingled with the crowd. They say there was pushing and muttering, indicating a state of unrest. They heard remarks from three different men in that group, indicating a frame of mind which could be disturbing. They were asked as to how long you were going to be permitted to talk. One man came across the Street and said to Officer Flynn, "if you don't get that so and-so off there, I will go over and get him down myself." The Officers acted on these appeals at the last stage, after hearing you stress the inequalities and the unfair things you claim you were disturbed about. They then heard you appeal to these people to stand up, and in arms or with arms, and to fight

Now, under those circumstances I think the officers were fully justified in feeling that a situation was developing which could very, very easily result in a serious disorder. I think the officers were very patient up to that time. I think that on the basis of the evidence here that you deliberately [fol. 279] agitated and that in every way that you could, you goaded these officers to action. They were right there on the opposite side of the street; you knew they were there. Your own witnesses who were there at the corner testified that the officers were there on the opposite side of the street. And you kept right on talking about racial inequalities, with this muttering; this angry muttering, which according to the Officers, made them feel that a situation was developing and which, they finally decided called for some action.

Now, they came across the street and they asked you to get down off the box, but before that—your own witnesses have testified to that same story with a slight variance; I am referring now to that part of the testimony of the Police Officers regarding the statement attributed to you, to rise up and fight. Your own witnesses say, yes, you did appeal to these people to rise up and fight, but so far as the "arming" is concerned, again according to your witnesses, it [fol. 280] was simply a case of "arm in arm" and walking away in that fashion. According to your witnesses there were only twenty-five persons there, and one of your witnesses says there were ten of your own people there. You certainly were not appealing to them over the loud speaker. I am impressed by what the officers say on that score. I think they had every reason in the world to believe, on the basis of the facts that they have testified to, that something serious was about to happen. And then the Officer asked you to get down off the box, and he asked you again, and then one of the Officers says he took you by the arm or reached for you. Three times you had to be requested to get off the box. I think that all those facts that have been testified to here are sufficient to sustain the charge of Disorderly Conduct.

Now, let me tell you one other thing my boy, and this may be a surprise to you. I don't bear the slightest ill will toward you. I haven't the slightest feeling; I haven't any feeling toward any man or woman in the world. You are [fol. 281] a human being and endowed with the dignity and

rights of any other human being. I have just as much respect for you as for anyone else, but I haven't much respect for the philosophy you endorse or for the remarks you made on that night in question. I think that talk of yours was designed to do the very things that Rabbi Friedman has spoken about; to line up class against class and race against race, and that philosophy of yours will never prevail in this country. I am sorry to see you here—I regret to take this position.

I find on the facts that you are guilty as charged in the Information and Warrant.

I am going to have you stay here until Mr. Cain the Probation officer can talk to you. Possibly he can do so this afternoon. So sentence is deferred until after the coming in of the report from Mr. Cain's office.

Mr. Greenberg: That may take some time and I plan to [fol. 282] take an appeal from this decision. I ask that the defendant be released on bail.

The Court: That is not possible.

Mr. Greenberg: We ask that he be sentenced immediately.

The Court: No, I am going to wait until we get a report from Mr. Cain.

Mr. Greenberg: That may take some time. This is a disorderly Conduct charge—I have never heard of any defendant being required to stay in prison for a first offense of this type.

The Court: I have heard of people going to jail on a disorderly Conduct charge.

Mr. Greenberg: Well it's quite rare that a person would [fol. 283] have to spend any time in jail on a charge of this kind. May I ask that he be sentenced immediately?

The Court: No.

Mr. Greenberg: I think we are entitled to it.

The Court: The sentence is deferred until the coming in of Mr. Cain's report.

Mr. Greenberg: If the Court please, this boy is a student and has classes to attend. Mr. Cain may not get his report to you for some time and in the meantime this man would be awaiting sentence in the jail where he might, in a case of this type, not normally be sent to jail.

The Court: That is why I am going to wait until the coming in of Mr. Cain's report.

[fol. 284] Mr. Greenberg: If you want Mr. Cain's report, I can arrange to deliver the defendant to Mr. Cain's office this afternoon.

The Court: He's still going to stay here.

Mr. Greenberg: I don't think he should wait in jail pending sentence.

The Court: His rights will be fully respected here. It is our practice here to hold defendants until we receive a report from the Probation office. Its the same practice as is followed in County Court. The sentence is not going to be pronounced until I receive Mr. Cain's report.

[fol. 285] Proceedings: May 9, 1949

PEOPLE

vs.

IRVING FEINER

The Court: Well, the report of Mr. Cain, the County Probation officer has been made to the Court, and the Court is now ready to pronounce sentence. Is there anything you want to say why sentence should not be pronounced?

Mr. Greenberg: No, no reason at this time.

Mr. Kelly: That question should be answered by the defendant.

Defendant: There's no reason.

SENTENCE

The Court: This is a very unpleasant duty that I now have to perform. I have tried in every possible way to [fol. 286] avoid being forced into this position. You have had the privilege of visits from some very high type, high grade men of this town. Their interest in you is entirely unselfish. They are interested in you because they want to do everything they can to help you. Now, their overtures have been of no avail because you are not ready to accept the suggestions and advice that was given to you. So there is nothing more I know of that can be said or done.

The sentence of this Court is that you serve a period of thirty days in the Onondaga County Penitentiary.

[fol. 287] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 288] In Court of Special Sessions of the City of Syracuse, County of Onondaga, New York

The People of the State of New York

against

Irving Feiner

Certificate of Conviction

May 9, 1949.

The above named Irving Feiner having been brought before William H. Bamerick, Justice of Special Sessions of the City of Syracuse, in the County of Onondaga, New York charged with disorderly conduct, in that on the 8th day of March, 1949 at the City of Syracuse, New York, one Irving Feiner did wilfully and unlawfully violate sub. 2 of Section 722 of the Penal Law of the State of New York in that he did act in such a manner as to annoy, disturb, interfere with, obstruct and be offensive to others by then and there in that he then and there provoked and caused a breach of the peace by causing a crowd to congregate at the corner of Harrison and S. McBride Streets, in the City of Syracuse, N. Y. and did act in such a manner by talking over a loud speaker system as to annoy, disturb, interfere with and be offensive to others, and in addition, did make insulting and derogatory remarks concerning certain public officials in this community and elsewhere in the city of Syracuse, New York.

And the above named Irving Feiner having been thereupon duly convicted, upon a plea of guilty. It is adjudged that he be imprisoned in the Onondaga County Penitentiary Thirty (30) days.

Dated at the City of Syracuse, the 9th day of May, 1949.

William H. Bamerick, Justice of Special Sessions,
City of Syracuse, New York.

State of New York,
County of Onondaga,
City of Syracuse, ss.:

I hereby certify that I have compared the foregoing with the original certificate signed by me, as a Court of Special

Sessions, and that the same is a correct copy thereof and transcript therefrom and of the whole thereof.

Witness my hand this 31st day of May, 1949.

Norbert B. West, Dep. of Special Sessions, City of Syracuse, New York. (Seal.)

STATE OF NEW YORK,
County of Onondaga,
City of Syracuse, ss.:

I certify that said defendant has served Three (3) Days in jail prior to his conviction and sentence.

William H. Bamerick, Justice of Special Sessions.

[fol. 289] IN COUNTY COURT OF ONONDAGA COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent

against

IRVING H. FEINER

RETURN TO APPEAL

I hereby make return to the appeal allowed herein as follows:

The defendant was brought before the Court of Special Sessions on the 10th day of March, 1949, charged with disorderly conduct. Upon arraignment the defendant stated that he was born in the United States of America, and resides at 746 South Crouse Avenue in the City of Syracuse, New York. He is twenty-four years of age and single. His mother is living; he can read and write, and is a student.

The defendant appeared with Mr. Sidney Greenberg, as counsel, and after being informed of his rights pleaded not guilty to the charge and demanded a trial. The trial of the case took place on May 5th & May 6th, 1949, at the conclusion of which the defendant was found guilty, and held for sentence on May 9th. On May 9th, 1949, the defendant was sentenced to thirty (30) days in the Onondaga County Penitentiary.

The test in each case is whether defendant's conduct, under all the circumstances led to or was likely to lead to disorder or public disturbance. People vs. Gogt, 178 Misc. 446. People vs. Bellows, 281 N. Y. 67.

It has been held that it is not essential that there be an actual breach of the peace. Of course, where there is no breach of the peace, there must be proof of circumstances which would form a logical basis for the opinion that the conduct tends to a breach of the peace. People vs. Sadowski, 149 Misc. 583. People vs. Galpern, 259 N. Y. 279. After reviewing the evidence in this case I conclude that there was sufficient evidence to show that the appellant's deportment was offensive and insulting, that it caused a crowd of about seventy-five people to gather upon the street and sidewalk; that it impeded pedestrians desiring to use the sidewalk; that the crowd showed evidence of unrest and some of them threatened violence to such an extent that the officer came to the conclusion that if it continued, disorder would result. The police apparently, in order to maintain peace and prevent disorder in the neighborhood, asked the appellant to desist and when his order was disobeyed, he made the arrest.

From the evidence in this case, I feel that the officer was justified in drawing the conclusion that unless the appellant desisted in his talk that disorder and violence would [fol. 292] result. Police officers are guardians of the public order. It is their duty to prevent disorder in the community and as such they may give reasonable directions. In this case, the police officer asked the appellant to stop talking, apparently in an effort to prevent disorder. This the appellant did not do but persisted in the continuance of his talk and the arrest followed. In my opinion the evidence was sufficient to support a finding that the appellant was guilty of the offense charged. People vs. Nixon, 248 N. Y. 182.

Upon the argument of the appeal the appellant laid great stress upon his constitutional right of freedom of speech. There is no doubt but that the right of free speech is guaranteed by the Federal and State Constitutions, but our Courts have held that the constitutional right of freedom of speech is not absolute, but is subject to such reasonable regulations as are necessary to promote and preserve the public peace. In Whitney vs. California, 274 U. S. 357, the Court said:

"That the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may chose or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom; and that a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question. Gitlow vs. New York, 268 U. S. 562, 666-668, and cases cited."

Likewise, in the case of Cantwell vs. Connecticut, 310 U. S. 296, the Court, in its discussion of the question, said:

"The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent [fol. 293] acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets or other immediate threat to public safety, peace or order appears, the power of the State to prevent or punish is obvious."

Under the circumstances, I do not feel that the constitutional rights of the appellant have been violated.

As to the third ground raised by the appellant, that the sentence of the Court was excessive, the law provides that the offense of disorderly conduct is punishable for a term of imprisonment not exceeding six months or by the fine not exceeding Fifty Dollars, or by both such fine and imprisonment. The sentence in this case was 30 days in the Onondaga County Penitentiary. I cannot say that the sentence imposed was excessive. The judgment of conviction and sentence imposed thereunder is therefore affirmed, and it appearing from the records of this Court that the appellant

was released on bail pending the outcome of this appeal, it is

Ordered that the appellant present himself in person before this Court on August 17th, 1949, at 10:00 o'clock in the forenoon to render himself in execution of the judgment.

Dated at Syracuse, N. Y., August 5th, 1949.

Leo W. Breed, Onondaga County Judge.

[fol. 294] In Court of Appeals of New York

People of the State of New York, Plaintiff,

vs.

Irving Feiner, Defendant

Petition for Appeal on Questions of Law—Filed August 16, 1949

To Hon. Edmund H. Lewis, Judge of the Court of Appeals of the State of New York:

The Petition of Sidney H. Greenberg states:

That petitioner is the attorney for the defendant above named and has an office for the practice of law at 715 State Tower Building, Syracuse, New York.

Petitioner further states, upon information and belief that on or about the 8th day of March, 1949, defendant was arrested and charged with the violation of Section 722 of the Penal Law of the State of New York, to wit:

> "Violation of Section 722 of the Penal Law of the State of New York in that on March 8, 1949, he did wilfully violate Section 722 of the Penal Law of the State of New York, in that he did then and there provoke and cause a breach of the peace by causing a crowd to congregate at the corner of Harrison and South McBride Streets in the City of Syracuse, and did act in such a manner by talking over a loud speaker system as to annoy, disturb, interfere with and be offensive to others, and in addition, did make insulting and derogatory remarks concerning certain public officials in this community and elsewhere."

That subsequent thereto and on the 9th day of May, 1949, after trial without a jury, defendant was convicted and sentenced to serve thirty (30) days in the Onondaga County Penitentiary; that subsequent thereto, an appeal was taken from said judgment of conviction to the County Court of the County of Onondaga and that on the 8th day of August, 1949, the said judgment of conviction was affirmed by the County Court of the County of Onondaga. That prior thereto, the defendant had been released on bail upon a [fol. 295] certificate of reasonable doubt issued by Hon. Leo Breed, Onondaga County Judge, and that the defendant is presently at liberty on bail and subject to an appearance in County Court on August 17, 1949.

Petitioner, on behalf of the defendant, makes this application for a certificate that a question of law is involved herein that ought to be reviewed by the Court of Appeals, pursuant to Section 520, Subdivision 3 of the Code of Criminal Procedure, and permitting further appeal on such question of law to the Court of Appeals. Petitioner states that the questions of law involved in this case are as follows:

1. That the People did not prove beyond a reasonable doubt the defendant committed the acts charged.

2. That the conviction of the defendant is invalid as an abridgement of the freedom of speech and assembly guaranteed by the First and Fourteenth Amendments of the Federal Constitution and Article 1, Section 8 of the State Constitution.

3. That the sentence of the Court was excessive.

In support of this contention, petitioner submits herewith a copy of the record of the trial herein and of the defendant's brief.

Petitioner on behalf of the defendant, verily believes that the People of the State of New York did not prove beyond a reasonable doubt that the defendant committed the crime of which he was convicted; that on behalf of the People, there appeared the two (2) arresting police officers; that on behalf of the defendant, there appeared several eye witnesses, some of whom were completely disinterested spectators, all of whom contradicted in almost every important detail, the testimony of the police officers; that in addition thereto, there appeared in the defendant's behalf, five (5) University professors who testified to the defendant's

good character and to his reputation for peacefulness and for truth and veracity.

[fol. 296] That a brief statement of the facts as claimed by the People and as contained in the People's Bill of Particulars is as follows:

"1. The estimated number of persons constituting the crowds congregating at the corner of Harrison and S. McBride Streets in the City of Syracuse, New York, was in excess of 50 and approximately 60 to 75 in number.

2. 3. & 4.

The acts and declarations in general tending to annoy, disturb, interfere with, and be offensive to others, and the names of the Public Officials referred to by the defendant are, insofar as the People are able to state at the present time, substantially as follows:

A. The defendant addressed the above crowd at the time and place in question through a microphone or other speaking apparatus with three (3) loud speakers, creating loud and unnecessary and disturbing sound over a wide area.

B. Referring to the Syracuse City Administration as "a Stinking Administration" and to various Public Officials in an insulting and derogatory and offensive manner, and by derogatory and offensive names to wit: The Honorable Frank J. Costello, Mayor of the City of Syracuse, N. Y., referred to and characterized as a "champagne sipping bum," The Honorable William O'Dwyer mayor of the City of New York, as "a "bum"; The Honorable Harry S. Truman, President of the United States as "a drunken bum" and "drunkard," and referring to members of the American Legion as "Nazi Gestapo Agents," and by referring to them and the above named officials and other officials and persons and organizations by other derogatory and offensive names and remarks of the same general nature, and which the People are unable to specify more particularly at the present time.

C. By ignoring and refusing to heed and obey reasonable police orders issued at the time and place mentioned in the Information to regulate and control

said crowd and to prevent a breach or breaches of the peace and to prevent injury to pedestrians attempting to use said walk, and being forced into the highway adjacent to the place in question, and prevent injury to the public generally.

The defendant further did annoy and disturb and was offensive to others by the above acts and by speaking to the people assembled at said point, who were mostly colored, in a manner tending to excite and arouse said people, and in urging the people there assembled, after addressing them in an inflammatory manner, to rise up and arm and fight, and by using other language of the same general nature which the People are unable to specify more particularly at the present time."

[fol. 297] That the People's witnesses testified substantially as stated in the Bill of Particulars, except that there was no testimony that the defendant said "rise up and arm and fight". The testimony of the People's witnesses was that the defendant said "rise up in arms and fight". The defense witnesses contradict all this testimony and all its details.

The defendant contends that his constitutional rights were violated and that the proof presented by the People did not prove that a crime was committed under the laws of the State of New York and of the United States and that there are important questions bearing on the right of free speech and free assembly that ought to be passed upon by the Court of Appeals. It is the contention of the defendant that he is entitled, under the laws of the State of New York and of the United States to hold and participate in a street meeting of the nature charged in the information, to use loud speaking equipment and that acting in such a manner is not a violation of law. On the proof, the defendant will claim that there was no proof beyond a reasonable doubt that he uttered the statements alleged in the information, and that even if he did, that the utterance of such statements does not constitute a crime of disorderly conduct.

Although defendant's reliance is upon the brief submitted in his behalf, a copy of which is herewith submitted, nevertheless, attention is specifically called to *Hague vs. C. I. O.*, 307 *U. S. 497*; one of the leading cases in the Court of Appeals, *People vs. Nixon*, 248 *N. Y. 182*; and, of course,

the recently decided case of *Terminiello vs. City of Chicago, decided by the U. S. Supreme Court, May 16, 1949.* It is the contention of the defendant that the questions of law arising in this case are comparable with the questions of law raised in the cases cited and other cases decided not only in the United States Supreme Court, but also in the Courts of the State of New York.

[fol. 298] Petitioner respectfully requests that Hon. Edmund H. Lewis, Judge of the Court of Appeals of the State of New York, certify that the questions of law involved in this case ought to be reviewed by the Court of Appeals and allow an appeal on such questions of law to the Court of Appeals.

Sidney H. Greenberg.

Duly sworn to by Sidney H. Greenberg. Jurat omitted in printing.

[File endorsement omitted.]

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 299] In Court of Appeals of New York

People of the State of New York, Plaintiff,

vs.

Irving Feiner, Defendant

Certificate as to Question of Law

Upon reading and filing the petition of Sidney H. Greenberg, attorney for the defendant herein, sworn to the 11th day of August, 1949, the record of the trial of this action, and upon hearing Sidney H. Greenberg, Esq., counsel for the defendant-movant, in support of a motion for the issuance herein of a certificate under Section 520, subd. 3 of the Code of Criminal Procedure, and Dan J. Kelly, Esq., Assistant District Attorney of Onondaga County, in opposition thereto and it appearing to my satisfaction that the record presents a question of law which ought to be reviewed by the Court of Appeals,

I Hereby Certify that a question of law is involved herein which ought to be reviewed by the Court of Appeals of the State of New York.

I Further Certify, pursuant to Section 528 of the Code of Criminal Procedure, that in my opinion there is reasonable doubt whether the judgment of conviction should stand.

Dated: August 15, 1949:

Edmund H. Lewis, Associate Judge of the Court of Appeals.

(Endorsed) Entered August 16, 1949 at 3:54 p. m. Onon. Co. Clerk's Office.

W. Snowdon Smith, III, Clerk. (Seal.)
xd/MR

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 300] In Court of Appeals of the State of New York

The People of the State of New York, Respondent,

v.

Irving Feiner, Appellant

Decided March 2, 1950

Appeal, by permission of an Associate Judge of the Court of Appeals, from a judgment of the Onondaga County Court, entered August 8, 1949, which affirmed a judgment of the Court of Special Sessions of the City of Syracuse (Bamerick, J.), convicting defendant of disorderly conduct in violation of subdivision 2 of section 722 of the Penal Law.

Sidney H. Greenberg for appellant.

Reuben T. Uretsky for New York State Civil Rights Congress, amicus curiae, in support of appellant's position.

Jesse E. Cantor, District Attorney (Dan J. Kelly of counsel), for respondent.

OPINION

CONWAY, J.?

Defendant was convicted of the offense of disorderly conduct (Penal Law, S. 722) in the Court of Special Sessions of the City of Syracuse. The conviction was affirmed by the Onondaga County Court and the case is here by permission of a Judge of this court.

On the evening of March 8, 1949, defendant, Irving Feiner, a student at Syracuse University, was addressing a group of people on South McBride Street, near Harrison Street, in the City of Syracuse. A complaint concerning the gathering was received over the telephone by the police department and two officers, Flynn and Cook, were dispatched to the scene to investigate. That was about 6:30 P.M. Officer Flynn, an acting sergeant, arrived in a police car about twelve or thirteen minutes later and found officer Cook already there in another police car. They observed a crowd [fol. 301] of approximately seventy-five or eighty people, both colored and white, gathered near defendant, who was standing on a large wooden box, situated between the sidewalk and a parked automobile on South McBride Street. The automobile was about forty or forty-five feet from the corner and the crowd extended to about twenty or twenty-five feet from the corner. The crowd covered an area of about fourteen by thirty-five feet.

Defendant was speaking into a hand microphone which was attached to loud speakers on the automobile. Between five and ten associates of defendant were present. They distributed circulars and helped set up the sound amplification apparatus. Defendant was exhorting his listeners to attend a meeting to be held that night in the Syracuse Hotel. In the course of his remarks, defendant "called Mayor Costello (of Syracuse) a champaign (sic) sipping bum and President Truman a bum. He referred to the American Legion as Nazi Gestapo agents—he also said the fifteenth Ward was run by corrupt politicians and that horse rooms were operating."

The crowd gathered by defendant filled the space between the curb and the building line on the sidewalk. Pedestrians, trying to use the sidewalk, were forced to step out to walk in the street. Some of the crowd spread out onto the street, and, since traffic was passing at the time, the officers attempted to get the people back on the sidewalk. As officer

Cook approached the scene earlier in the police car, he "had to slow down pretty near to a stop at that point" because of the pedestrians in the street.

Officer Flynn further observed that there was "angry muttering" throughout the crowd and he had trouble getting through it. The crowd was restless. There was some push-[fol. 302] ing and shoving. They were milling around back and forth. Remarks were being made in the audience both for and against the speaker. "Some were calm and some were not—they were discussing the speech pro and con." There was, however, no disorder. After telephoning the police station from a nearby store, Flynn returned to the police cars with Cook and then they crossed the street and mingled with the crowd.

Defendant was speaking in a loud, high-pitched voice and was appealing to the colored people in particular. Defendant said that the Negro people did not have equal rights and that they should rise up in arms and fight for them. Flynn got the "impression" that defendant was trying to arouse the Negro people against the whites. Defendant's statement that the Negro people should rise up in arms and fight "stirred up a little excitement" and the crowd "seemed to mill around a little then." One man approached the officers and said "if you don't get that 'son of a bitch' off, I will go over and get him off there myself." Other persons made remarks about the police force not being able to handle the crowd and that "they did not see why they had to put up with that kind of stuff in the neighborhood."

At this point, Flynn "figured it had gone far enough." The crowd was "getting to the point where they would be unruly." Although there had been no actual disturbance, Flynn said, "we stepped in to prevent it from resulting in a fight." Flynn approached the defendant, not for the purpose of arresting him, but to get him to break up the congregation. He asked defendant to get down off the box but the latter "just looked and kept right on talking to the crowd". Flynn waited a minute and then demanded that he get down, but defendant still refused. The crowd, which was now quiet, was pressing closer around defendant and the [fol. 303] officer. Finally, Flynn told defendant he was under arrest and reached up to grab him. Defendant stepped down off the box and announced over the microphone that "the law has arrived, and I suppose they will take over

now." In all, Flynn had asked defendant to get down three times over a space of four or five minutes. Officer Flynn had been present at the scene about fifteen or twenty minutes and Cook about twenty-five or thirty minutes. Defendant, of course, had been speaking for some time longer than a half hour.

On his case, in addition to character witnesses from the faculty of Syracuse University, defendant introduced evidence controverting the officers' testimony concerning the size and temperament of the crowd, the degree of obstruction of the sidewalk and street, the substance of the talk, and defendant's response to the officer's request. Portions of this testimony corroborated elements of the People's case; portions were not believed by the trial judge.

On the evidence, the Special Sessions judge found defendant guilty of disorderly conduct under section 722 of the Penal Law. In section 722, the Legislature has enumerated certain acts which, if committed with intent to provoke a breach of the peace, or which, even without such intent, may reasonably occasion a breach of the peace, render the actor guilty of disorderly conduct. The section provides in part as follows:

"Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

"1. Use of offensive, disorderly, threatening, abusive or insulting language, conduct or behavior;

[fol. 304] "2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;

"3. Congregates with others on a public street and refuses to move on when ordered by the police;"

Defendant was charged with and found guilty of a violation of subdivision 2 of section 722, but it is settled that the judgment of conviction in a case such as this will be affirmed if the evidence establishes a violation of any of the subdivisions of the section. (People v. Hipple, 263 N. Y. 242, 244.)

In finding the defendant guilty, the court, in an oral decision addressed to defendant, said: "* * * You had a perfect right to appear there and to use that implement, the

loud speaker. You had a right to have it in the street. There is no question about that. * * *" The court further assumed that defendant had a legal right to refer to Mayors Costello and O'Dwyer, President Truman and the American Legion in abusive and disrespectful terms. The trial judge then reviewed the evidence, pointing out the size of the crowd gathered by the defendant, the blocking of the sidewalk, the necessity for pedestrians to walk out on the roadway and the unrest and hostility engendered in a portion of the crowd. He continued:

"Now, under those circumstances I think the officers were fully justified in feeling that a situation was developing which could very, very easily result in a serious disorder. I think the officers were very patient up to that time. I think that on the basis of the evidence here that you deliberately agitated and that in every way that you could, you goaded these officers to action. * * *

"* * * I think they (The police officers) had every reason in the world to believe, on the basis of the facts that [fol. 305] they have testified to, that something serious was about to happen. And then the Officer asked you to get down off the box, and he asked you again, and then one of the Officers says he took you by the arm or reached for you. Three times you had to be requested to get off the box. I think that all those facts that have been testified to here are sufficient to sustain the charge of Disorderly Conduct. * * *

"I find on the facts that you (are) guilty as charged in the information and Warrant."

The findings contained in the decision of the trial judge sufficiently establish that defendant, under section 722 and our cases construing it, was guilty of disorderly conduct—putting aside, for the moment, constitutional objections to the conviction.

The statement made by the trial judge to defendant that "on the basis of the evidence here * * * you deliberately agitated * * * and in every way that you could, you goaded these officers to action" was clearly a finding that defendant, by his conduct under the circumstances, intended to provoke a breach of the peace. Certainly, defendant acted "in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others," within the meaning of subdivision two, and such conduct, in conjunction with an

intent to provoke a breach of the peace, is sufficient in itself to establish the offense of disorderly conduct. The defendant's conduct, at the very least, was such that it tended to disturb the public peace and quiet and to occasion a breach of the peace. That, under our cases, is sufficient. (People v. Nixon, 248 N.Y. 182, 188-189; People v. Galpern, 259 N.Y. 279, 281-282, 284-285; People v. Hipple, supra; People v. Monnier, 280 N.Y. 77, 78-79; People v. Edel, 286 N.Y. 637.) [fol. 306] It is clear, apart from constitutional objections, that defendant's refusal to accede to the requests of the police officer within the scope of his lawful authority justified defendant's arrest and subsequent conviction for disorderly conduct. (People v. Nixon, supra; People v. Galpern, supra.)

Defendant's main contention on this appeal is that his conviction of the offense of disorderly conduct violates the right of freedom of speech guaranteed by our Federal and State Constitutions. We assume that the constitutional question was properly raised below, even though defendant's attorney did not specifically move on the record to dismiss on that ground, for both courts below considered it.

It is perhaps laboring the obvious and oft-repeated to state that the constitutional guarantee of freedom of speech is not an absolute right to be indiscriminately exercised under all circumstances and conditions. Social welfare requires, in certain instances, reasonable regulation of freedom of speech which, unrestrained, would produce calamitous or undesirable results—not only for the locality and public order but also in the long run, for the individual involved. The preservation of order and the prevention of disturbance are of prime importance to the State. As was said in Cox v. New Hampshire (Hughes, Ch. J., 312 U.S. 569, 574): "Civil Liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but [fol. 307] rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. * * *"

In the instant case, we have a situation in which on a public street a portion of defendant's audience became enraged and aroused at his utterances. Others were sympathetic and were present for the specific purpose of assisting and applauding the efforts of the defendant. The crowd became restless and potentially unruly. It filled the sidewalk and spilled out into the adjacent thoroughfare obstructing or impeding both pedestrian and vehicular traffic. An imminent danger of a breach of the peace, of a disturbance of public order, perhaps even of riot, was threatened. Defendant, at the very least, knew of the condition and was heedless of the potential evil consequences. More, as found by the trial court, he deliberately continued in a vein calculated to precipitate those consequences. We do not think, under those circumstances, that defendant had a constitutional right to disregard the police officer's word of warning with impunity and to continue to blare out his provocative utterances over loud speakers to a milling, restless throng composed of hostile and sympathetic listeners. Where both the audience and the speaker are inevitably proceeding toward an eruption of civil strife—where, indeed, both seem to be working up to a pitch where serious disorder might well be expected—the power and duty of the State to punish the speaker who refuses to desist after appropriate warning is clear.

Justice Roberts stated the relevant considerations well in Cantwell v. Connecticut (310 U. S. 296, 308) as follows: "The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public [fol. 308] order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears the power of the State to prevent or punish is obvious. Equally obvious is it that a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions. * * *"

In the instant case, there is no indication that the action of the police officer was taken as a subterfuge or excuse for

suppression of defendant's views and opinions. The courts below have found, and we are bound by the finding, that the officer was motivated solely by a proper concern for the preservation of order and the protection of the general welfare, in the face of an actual interference with traffic and an imminently threatened disturbance of the peace of the community.

We are well aware of the caution with which the courts should proceed in these matters. The intolerance of a hostile audience may not, in the name of order, be permitted to silence unpopular opinions. (49 Col. L. Rev. 1118.) The Constitution does not discriminate between those whose ideas are popular and those whose views arouse opposition or dislike or hatred—guaranteeing the right of freedom of speech to the former and withholding it from the latter. We recognize, however, that the State must protect and preserve its existence, and, unfortunate as it may be, the [fol. 309] hostility and intolerance of street audiences and the substantive evils which may flow therefrom, are practical facts of which the courts and the law enforcement officers of the State must take notice. Where, as here, we have a combination of an aroused audience divided into hostile camps, an actual interference with traffic and a speaker who is deliberately agitating and goading the crowd and the police officers to action, we think a proper case has been made out, under our State and Federal Constitutions for punishment.

Defendant's principal, but mistaken, reliance is upon the recently-decided case of Terminiello v. Chicago (337 U. S. 1). There the Supreme Court reversed the conviction of the defendant upon the ground that it might have been based upon certain instructions of the trial judge to the jury authorizing a verdict of guilty if defendant's speech stirred the people to anger, invited dispute or brought about a condition of unrest. It there appeared that the speech of Terminiello was delivered in a private hall or auditorium and not upon the public street. In the abstract, no one may disagree with the proposition that a person cannot constitutionally be convicted for doing no more than delivering a speech which stirs people to anger, invites dispute or brings about a condition of unrest. That, however, is not the instant case. Here, the defendant, as indicated above, disrupted pedestrian and vehicular traffic on the sidewalk and street, and, with intent to provoke a

breach of the peace and with knowledge of the consequences, so inflamed and agitated a mixed audience of sympathizers and opponents that, in the judgment of the police officers present, a clear danger of disorder and violence was threat-
[fol. 310] ened Defendant then deliberately refused to accede to the reasonable request of the officer, made within the lawful scope of his authority, that the defendant desist in the interest of public welfare and safety.

We conclude that defendant was properly convicted of the offense of disorderly conduct and that his conviction, under the circumstances, does not infringe upon his constitutional right to freedom of speech.

The judgment should be affirmed.

Loughran, Ch. J., Lewis, Desmond, Dye, Fuld and Froessel, JJ., concur.

Judgment affirmed.

[fol. 311] In Court of Appeals of New York

State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 2nd day of March in the year of our Lord one thousand nine hundred and fifty before the Judges of said Court.

Witness, the Hon. John T. Loughran, Chief Judge, Presiding.

John Ludden, Clerk.

The People &c, Respondent,

ag'st

Irving Feiner, Appellant

Remittitur—March 3, 1950

Be it Remembered, That on the 22nd day of December, in the year of Our Lord one thousand nine hundred and forty-nine, Irving Feiner, the appellant in this cause, came here unto the Court of Appeals, by Sidney H. Greenberg, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the County Court, Onondaga County And The People &c, the respondent, in

said cause, afterwards appeared in said Court of Appeals by William H. Bowers, District Attorney Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals this cause having been submitted, brief having also been filed by omici curise, after due deliberation had thereon, did order and adjudge that the judgment appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the record afore- [fol. 311a] said, and the proceedings in this Court, be remitted to the County Court, Onondaga, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, as aforesaid

And hereupon as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the County Court, Onondaga County before the Judge thereof, according to the form of the statute in such case made and provided to be enforced according to law, and which record now remains in the said County Court before the Judge thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE

Albany, March 3, 1950

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 312] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1949

No. 421, Misc.

On petition for writ of Certiorari to the Court of Appeals of the State of New York.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS; GRANTING PETITION FOR WRIT OF CERTIORARI, ETC.—May 29, 1950

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 850.

It is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 93

IRVING FEINER,

Petitioner,

vs.

PEOPLE OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR PETITIONER

SIDNEY H. GREENBERG,
Attorney for Petitioner,
Office & P. O. Address,
715 State Tower Bldg.,
Syracuse 2, New York.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 93

IRVING FEINER,

Petitioner,

vs.

PEOPLE OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals is reported in 300 N. Y. 391. The opinions of the Trial Court and of the County Court of Onondaga County have not been reported and are contained in full in the Record, pages 136 and 145.

Jurisdiction

The jurisdiction of this Court rests under Section 237 (b) of the Judicial Code as amended by the act of June 25, 1948,

62 Stat. 992 (Title 28, Sec. 344 (b) U. S. Code, as amended).

The petition for a writ of certiorari was granted on May 29, 1950 (R. 163).

Statutes and Information Involved

(a) The information with which the petitioner was charged in the Court of Special Sessions of the City of Syracuse, New York is as follows (R. 15):

> "You are charged by Dennis Flynn, Police Officer, that on the 8th day of March, 1949 in the City of Syracuse, New York, you did wilfully and unlawfully violate subdivision 2 of Section 722 of the Penal Law of the State of New York in that you did act in such a manner as to annoy, disturb, interfere with, abstruct and be offensive to others, by then and there provoking and causing a breach of the peace, by causing a crowd to congregate at the corners of Harrison and S. McBride Streets in the City of Syracuse, New York, and did act in such a manner by talking over a loud speaker system as to annoy, disturb, interfere with and be offensive to others, and in addition, did make insulting and derogatory remarks concerning certain public officials in this community and elsewhere."

(b) Section 722 of the Penal Law of the State of New York, insofar as here applicable:

> "Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:
>
> 1. Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior;
>
> 2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;
>
> 3. Congregates with others on a public street and refuses to move on when ordered by the police;

4. By his actions causes a crowd to collect, except when lawfully addressing such a crowd."

Statement of the Case

The petitioner was charged in the information with the commission of an offense against the State of New York, Section 722 of the Penal Law of the State of New York. After arraignment and plea, petitioner moved before trial to dismiss the information upon grounds of constitutional and legal invalidity (R. 1). The motion to dismiss was denied by the Court of Special Sessions without opinion (R. 15).

The trial took place before Hon. William H. Bamerick, Justice of the Court of Special Sessions of the City of Syracuse, New York, without a jury, on May 5, 6 and 9, 1949. Motion for a dismissal of the Information on constitutional grounds was made at the close of the People's case and denied (R. 67). The same motion was made at the close of the entire case with the same ruling (R. 130). The Court found the petitioner guilty and sentenced the petitioner to imprisonment for a period of thirty (30) days on May 9, 1949. Upon application to the County Court of the County of Onondaga, New York, petitioner was admitted to bail in the sum of One Thousand ($1,000.00) Dollars, pending the determination of the appeal to the County Court. The County Court affirmed the judgment of conviction on August 5, 1949 after hearing argument raising questions under the First and Fourteenth Amendments to the United States Constitution, and an order was entered thereon on August 8, 1949. Notice of Appeal to the Court of Appeals was filed on August 16, 1949, pursuant to an order made on August 15, 1949 by Hon. Edmund H. Lewis, Associate Judge of the Court of Appeals, certifying the matter to the Court of Appeals, after hearing argument on a petition raising the

First and Fourteenth Amendments to the United States Constitution. The petitioner was admitted to bail pending appeal to the Court of Appeals in the sum of One Thousand ($1,000.00) Dollars, by an order of Judge Lewis, made on August 17, 1949.

The cause was submitted to the Court of Appeals of the State of New York in January, 1950. A brief, raising constitutional questions was filed therewith. The decision of the Court of Appeals was rendered on March 2, 1950, unanimously affirming the judgment of conviction. Judgment was entered on March 2, 1950.

By an order of Judge Lewis, dated March 8, 1950, the bail of the petitioner was continued until April 3, 1950, pending the determination of an application for a writ of certiorari. The writ was granted on May 29, 1950. The petitioner is still continued on bail.

Petitioner's conviction arose out of a speech made by him in the early evening of March 8, 1949, at a street meeting at the corner of Harrison and So. McBride Streets in the City of Syracuse, New York, called and conducted under the auspices of the Young Progressives of America (R. 19). It was a protest meeting, to protest and criticize the cancellation of authorization previously granted to Mr. O. John Rogge, former Assistant U. S. Attorney General, to speak at a public high school (R. 125, 126), and at the same time, call to the attention of the people that, despite the cancellation, Mr. Rogge would speak that night, not at the high school, but at the Hotel Syracuse (R. 19, 26). This incident of the denial of the use of a public school by the local authorities, for a public address by a former high government official was used by the petitioner in his speech to illustrate the threat to civil liberties and the importance of vigilant defense of these liberties (R. 22, 25, 126).

It is undisputed that the meeting was lawfully called, and held for a lawful purpose. It is similarly undisputed that

the meeting, which lasted about thirty minutes, proceeded from beginning to end in a peaceful and orderly fashion. No violence, disturbance or disorder of any kind occurred.

The meeting terminated with petitioner's arrest, first for unlawful assembly, finally for disorderly conduct (R. 43). Petitioner submitted to arrest in an orderly manner, offered no resistance and closed the meeting (R. 43).

The only witnesses for the prosecution were the two arresting police officers. They testified in substance, that during the course of the meeting, petitioner characterized various public officials in uncomplimentary terms (R. 19); that the 15th Ward was run by corrupt politicians and that horse rooms were operating (R. 19); that the Negro people did not have equal rights and should rise up and fight for them (R. 25).

Both officers were in agreement that the crowd was orderly although there was some pushing and shoving but not to excess (R. 41). That there was muttering in the crowd (R. 19, 20) but that this meant that some appeared to be for the speaker and some against (R. 41); that some people, about 10 (R. 32) were required to walk in the road because of the crowd on the sidewalk, although none of the pedestrians complained to the police; that no complaints had been made by any persons in the crowd or in the neighborhood except three (R. 59); that neither of the officers had given any instructions either to the crowd or to the speaker, prior to the arrest, although both were present on the scene between twenty and thirty minutes (R. 36, 37); that the petitioner was asked twice to stop speaking, and got down from his stand voluntarily upon being told that he was under arrest, and that no more than two minutes had elapsed from the time of the first request made by the police officer (R. 43); and that at no time did the petitioner ask the Negroes to take action against white people (R. 42).

The material testimony of the police officers was sharply controverted by witnesses for the petitioner (R. 74, 76, 77, 84, 97, 100, 101, 102, 107, 110, 113, 114, 123, 125).

Specification of Errors to Be Urged

1. The Court below erred in affirming the judgment of the Trial Court because:

(a) The petitioner's speech was protected by the First and Fourteenth Amendments; and

(b) The petitioner's speech was not delivered under such circumstances shown likely to create a clear and present danger of substantive evil.

2. The Court below erred in affirming the judgment of the Trial Court because:

(a) The prosecution failed to prove that the petitioner intended to provoke a breach of the peace or that there was an imminent breach of the peace under Section 722 of the Penal Law of the State of New York, in the context of the First and Fourteenth Amendments.

1. The speech was peaceful.

2. The audience was peaceful.

3. The traffic situation was not abnormal.

4. Petitioner's failure to accede to the request of the police to cease speaking was not unlawful.

3. The Court below erred in affirming the judgment of the Trial Court because:

(a) The Court accepted the erroneous interpretation of the clear and present danger rule and held a provocative speech to be unlawful.

(b) The Court accepted the finding of the Trial Court regarding the judgment and motive of the police officer, thereby erroneously making the petitioner's right to speak dependent on same.

(c) The Court did not disturb the ruling of the Trial Court that freedom of speech is dependent on other people's wishes and convenience.

4. The Court below erred in holding that the existence of a clear danger rather than a clear and present danger was sufficient to make petitioner's speech unlawful.

ARGUMENT

I. The Conviction of the Petitioner Abridges the Basic Constitutional Rights of Freedom of Speech and Assembly Guaranteed by the First and Fourteenth Amendments of the United States Constitution and Squarely Conflicts With the Binding Decisions of the United States Supreme Court.

The First Amendment, so far as material, provides that Congress "shall make no law abridging the freedom of speech or of the press." The Fourteenth Amendment extends this to the States and their subdivisions. *Lovell* v. *Griffin*, 303 U. S. 444, 450; *Hague* v. *C. I. O.*, 307 U. S. 496, 512.

A breakdown of the Information reveals that the Petitioner is charged with "causing a crowd to congregate at the corners of Harrison and So. McBride Streets in the City of Syracuse, New York," and "talking over a loud speaker system as to annoy, disturb, interfere with and be offensive to others," and making "insulting and derogatory remarks concerning public officials in this community and elsewhere."

An examination of the testimony, and for the purposes herein required, but without admitting same, we will accept as true the testimony of the two police officers who were the only prosecution witnesses, reveals that the petitioner did cause a crowd to congregate, did speak over a loud speaker system, did annoy others, and did make derogatory remarks concerning certain public officials.

When measured against the clear mandate of the Constitution and the decisions of this Court, nothing unlawful has been proven. Holding a public meeting and addressing a crowd as such, does not constitute unlawful conduct. *Hague* v. *C. I. O.*, 307 U. S. 497. Talking over a loud speaker system is similarly lawful. *Saia* v. *New York*, 334 U. S. 558. "Plainly, a community may not suppress the dissemination of views because they are unpopular, annoying or distasteful." *Murdock* v. *Pennsylvania*, 319 U. S. 105, 116.

In *Cantwell* v. *Connecticut*, 310 U. S. 296, this Court said, at Page 310:

> "In the realm of religious faith and in that of political belief, sharp differences arise. In both fields, the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know it, at times resorts to exaggeration, to vilification of men who have been or are prominent in church or state and even to false statements. But the people of this Nation have ordained in the light of history, that in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to the enlightened opinion and right conduct on the part of the citizens of a democracy."

There is no escaping the fact that the Petitioner was exercising his constitutional right to speak on the streets of his community. Not only did he speak, but he spoke about things that mattered; things that would arouse and excite people, things that would cause them to take action to re-

move the evils about which he spoke. During the course of this speech, he undoubtedly irritated some of his hearers and since he spoke against the administration of the City of Syracuse, he undoubtedly annoyed and disturbed the police officers present on the scene.

The question is not the small annoyances and inconveniences, but is, as Mr. Justice Holmes laid down in *Schenck* v. *U. S.*, 249 U. S. 47, 52, "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

Unfortunately, during the course of the meeting, there was a small amount of annoyance of a practical nature. There was some small inconvenience to pedestrian traffic. This Court has held in *Bridges* v. *California*, 314 U. S. 262:

> "Freedom of speech, though not absolute is nevertheless protected against censorship or punishment unless shown likely to produce a clear and present danger of a serious and substantive evil that arises *far above public inconvenience, annoyance or unrest.*" (Emphasis ours.)

The charges will be taken up *seriatim.*

A. CAUSING A CROWD TO CONGREGATE AT THE CORNERS OF HARRISON AND SOUTH MC BRIDE STREETS IN THE CITY OF SYRACUSE, NEW YORK.

1. *The Petitioner had a right to hold a street corner meeting.*

Penal Law Section 722, Subdivision 4, reads:

> "By his actions cause a crowd to collect except when lawfully addressing such a crowd."

There is no dispute here that about seventy-five (75) people gathered on the above-mentioned corner to hear the Peti-

tioner speak through a hand microphone. (R. 18.) Reference is again made to *Hague* v. *C. I. O., supra,* wherein this Court stated:

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."

We concede that this Court has placed some limitations on the right of free speech, nevertheless, preference is always to be given "to the great indispensable freedoms secured by the First Amendment." *Thomas* v. *Collins*, 323 U. S. 516, 530. See also *Bridges* v. *California, supra.*

2. *There was no serious interference with traffic.*

The testimony of the police indicates that "approximately ten people" were seen by them walking in the street because of the crowd on the sidewalk. (R. 32.) We contend that inconvenience caused to "approximately ten people", during the course of a thirty minute address, is far from a "serious and substantive evil."

On the subject of vehicular traffic, the record may be searched in vain for more than a passing reference. The record of the trial, containing some one hundred twenty-nine

(129) printed pages of testimony, contains, at pages 48 and 49, only the following reference to vehicular traffic:

> "Q. (By Mr. Kelly) I ask you whether the street was heavily traveled that night?
> A. (By Officer Cook) I don't recall that.
> Q. (By The Court) Tell what you did observe about the traffic?
> A. I observed there was traffic there, yes.
> Q. Was the volume of traffic large or small?
> A. As I recall, it was not heavy.
> Q. Do you recall anything else about the traffic situation that night?
> A. Well, as I drove on South McBride St. and went past this crowd, I had to slow down pretty near to a stop at that point.
> Q. (Mr. Kelly) When you came to that point was the street obstructed by pedestrians in the street?
> A. Yes.
> Q. When you slowed down did you give any signal?
> A. I tooted the horn a couple of times."

It should be noted that except for the above the record contains no reference to vehicular traffic; no illustration to show interference with vehicular traffic; not a single vehicle is named or referred to as being impeded in any way during the course of the thirty-minute talk, during which one or both of the police officers were present.

We further contend that so little was the inconvenience to any kind of traffic, vehicular or pedestrian, that both police officers found it unnecessary to give any instructions, or perform any act to improve the vehicular situation. Police Officer Flynn testified as follows on this subject at pages 36 and 37:

> "Q. (By Mr. Greenberg) Did you at any time ask the crowd to move away so that people could go through the crowd, or pedestrians could walk through?
> A. (By Officer Flynn) No.

Q. Did you at any time walk up to the defendant and tell him that traffic was being obstructed?

A. No.

Q. So that prior to the time you placed the defendant under arrest you gave no instructions either to the crowd or to the defendant or anyone else involved in this meeting?

A. That is right."

Police Officer Cook, at page 48, testified as follows:

"Q. (By Mr. Kelly) What if anything did you do relative to trying to make it possible for the people to go up and down the sidewalk?

A. (By Officer Cook) We did not do anything at the time."

Further significance is attached to this lack of action on the part of the police, by the complete omission of any complaint from any source as to the traffic situation.

At page 59, Officer Cook, who was present during substantially the entire course of the meeting testified as follows:

"Q. (By the Court) Did anyone come over and complain about not being able to use the sidewalk?

A. (By Officer Cook) No.

Q. (By Mr. Greenberg) You were in a Police car that night?

A. Yes.

Q. And the word, "Police" was on the side of the car?

A. Yes.

Q. And you were in uniform?

A. Yes.

Q. If anyone wanted to make a complaint, they could have come over across the street and talked to you without any trouble?

A. Yes."

Although the facts here, demonstrate that there was no interference with vehicular traffic and a small interference with pedestrian traffic, nevertheless, the conduct of the police officers, and their apparent concern for the traffic problem, would have been more credible had they found it necessary to perform one act, or give one word of instruction to anyone present on the scene to remedy any interference with traffic, that might have existed. That the police officers found it necessary to break up the meeting, rather than to perform their duty to facilitate the flow of traffic, is an inconsistency in their conduct that belies the laudatory motives they claimed to have.

Freedom of speech and of assembly become meaningless when lower courts, in applying the general rule that these freedoms are not absolute, are allowed to set up their own standards by which to circumscribe these freedoms. We do not contend that the Petitioner has an absolute freedom to hold a public meeting anywhere he pleases. We do not contend that he has an absolute right to conduct a public meeting in the middle of the busiest thoroughfare in the community, thereby disrupting vehicular traffic and the normal business affairs of the area. The Supreme Court has laid down the standards, contained in the "clear and present danger" doctrine, whereby this type of freedom of speech may be circumscribed. Where the line is drawn, will presumably be determined by the facts in each case.

As Justice Holmes said, "the question in every case is whether the words used are used *in such circumstances* . . . " (Emphasis ours) *Schenck* v. *U. S.*, 249 U. S. 47, 52; and as Justice Brandeis said in the *Whitney* case, 274 U. S. 357, 377, "only an emergency can justify repression," and as he said further at page 376, "to justify suppression of free speech . . . there must be reasonable ground to believe that the danger apprehended is imminent."

If, in this case, the line is drawn at a point where some ten people are compelled to walk in the roadway, and a police car is caused to "slow down" on approaching the intersection, then, for all practical purposes, freedom to hold a public meeting on the streets of the City of Syracuse has ceased to exist; the reasoning of the *Hague* case, the *Schenck* case and the *Whitney* case, tortured out of all semblance of their original meaning, and the whole line of cases in the Supreme Court, stemming from those decisions, have become of no moment.

We cannot deny that the assembling of a crowd to hear the petitioner speak, whether that crowd consists of seventy-five people, as the prosecution contends, or of twenty-five or thirty people, as opposing witnesses contend, will frequently discommode others in the community. Whether a pedestrian is compelled to push through the crowd, walk on the roadway, or cross to the other side of the street, does not materially alter the fact that this pedestrian is discommoded and inconvenienced in seeking passage over that portion of the sidewalk where the meeting is being conducted. Whether ten people are so discommoded, or twenty, is perhaps not a material isue. This Court has said:

> "Unless we are to retreat from the firm positions we have taken in the past, we must give freedom of speech in this case, the same preferred treatment that we gave freedom of religion in the *Cantwell* case; freedom of the press in the *Griffin* case and freedom of speech and assembly in the *Hague* case." *Saia* v. *New York*, 334 U. S. 558.

The same decision, at page 562, instructed the Courts to:

> "balance the various community interest in passing on the constitutionality of local regulations of the character involved here. But, in that process, they should

be mindful to *keep the freedoms of the First Amendment in a preferred position.*" (Emphasis ours)

Admitting then, the incidental interference with pedestrian traffic, and the non-existent interference with vehicular traffic, the meeting at which the petitioner spoke on the night of March 8, 1949, being an exercise of the right of free speech and of assembly, should have been given the preferred treatment to which Mr. Justice Douglas alluded above. That the courts below did not follow this rule will be seen from the subsequent discussion.

3. *The conduct of the crowd did not make the meeting unlawful.*

Under the charge of "causing a crowd to congregate," some attention must be given to the proof directed to the conduct of the crowd. Police Officer Flynn, at pages 19 and 20, testified as follows:

"Q. (By Mr. Kelly) Did you observe the temperament of the crowd?

A. (By Officer Flynn) Yes.

Q. What did you observe about that?

A. I observed that there was angry muttering throughout the crowd, and the crowd hampered the use of the sidewalk."

At pages 21 and 22 is the following testimony:

"Q. (By Mr. Kelly) What did you observe and hear as you mingled with the crowd?

A. (By Officer Flynn) I observed that there was pushing and shoving and I had trouble getting through some portion of the crowd—I also heard angry muttering, especially when the defendant continued to speak after I requested him to stop.

Q. Were there any persons that expressed disapproval of what he was saying?

A. When Mr. Feiner stated that the negro people did not have equal rights and should rise up and fight, one man came up and said to me, "if you don't get that 'son of a bitch' off, I will go over and get him off there myself."

And at page 23:

"Q. (By Mr. Kelly) Did you observe that there was unrest in the crowd?
A. (By Officer Flynn) Yes."

And at page 25:

"Q. (By Mr. Kelly) Were any remarks made by people in the crowd at that time?
A. (By Officer Flynn) Yes.
Q. And immediately following, what did you do?
A. At that time, when the gentleman came up and made the statement I testified to, I figured it had gone far enough so I went over to Mr. Feiner."

And after describing his attempt to stop the petitioner from speaking, at page 26:

"Q. (By Mr. Kelly) What was the condition of the crowd at that time?
A. (By Officer Flynn) They were all coming closer and getting around my neck to see what was going to happen.
Q. Was the crowd noisy?
A. No, quiet.

And at Page 41:

"Q. (By Mr. Greenberg) You say you heard angry muttering?
A. (By Officer Flynn) Yes.
Q. Will you describe that? What did they consist of?
A. Well, some of the remarks were for and some against Mr. Feiner.
Q. Did anyone do anything besides mutter?

A. Some of the crowd were pushing and shoving at that stage, *but not to excess.* (Emphasis ours)

Q. You did not regard it as a disturbance?

A. Not at the time, but we stepped in to prevent it from resulting in a fight. After all there was angry muttering and pushing."

At pages 49-51, Officer Cook testified as follows:

"Q. (By Mr. Kelly) You say you did mingle with the crowd that was assembled at this point?

A. (By Officer Cook) Yes. We walked through there.

Q. What did you observe as to the attitude of that crowd?

A. They were kind of restless.

Q. What were they doing?

A. They were kind of *more or less conversing about the speech* Mr. Feiner was making. (Emphasis ours)

Q. Any arguments going on?

A. Some were calm and some were not—they were discussing the speech pro and con.

Q. Any disorder there?

A. *Not that I know of.* (Emphasis ours)

Q. Tell us just what the crowd was doing?

A. Milling around back and forth—and a couple of times I heard someone say they did not see why they had to put up with that kind of stuff in the neighborhood.

Q. What happened to the pedestrians on the street?

A. They had to go around in the road—they could not get by on the sidewalk.

Q. Now you say the defendant made remarks about different City officials and Federal officials—Were there any other remarks made by anyone?

A. There was a fellow came by and Denny was talking to him—we were listening to the speaker at the time.

Q. What did he say?

A. He said, "if you don't take that son of a bitch off there, I will take him off myself."

Q. What was the general attitude of the crowd at that time?

A. They were *getting to the point where they would be unruly.* (Emphasis ours).

Mr. Greenberg: I object to that as not binding on the defendant.

The Court: Yes, he ought to be more specific than that. I will sustain the objection.

Q. (By Mr. Kelly) About the time that remark was made what was the crowd doing then?

A. (By Officer Cook) *They were listening to the speaker.* (Emphasis ours)

Q. What else were they doing?

A. I don't understand what you mean.

Q. Were they moving about or jostling or disturbing anybody?

A. They were obstructing the sidewalk."

Also at page 52:

"The Court: Objection is sustained to that question —What else was said officer, that you can recall?

A. (By Officer Cook) I know he said the negroes should rise up in arms and fight for their rights.

Q. (By Mr. Kelly) That statement was made by the defendant, Feiner?

A. Yes.

Q. Was that the time you and Officer Flynn went over to talk to the defendant?

A. It was shortly after that.

Q. Did you notice the attitude of the crowd after that statement was made?

A. Yes, they seemed to mill around a little then.

Q. Were they as well behaved after that remark as they were before?

A. It stirred up a *little excitement.*" (Emphasis ours)

At page 60:

> "Q. (By Mr. Greenberg) Now, you say when you walked through the crowd, some people seemed to be in favor of the speaker and some against him?
> A. (By Officer Cook) That is the impression I got.
> Q. Did anyone start any fight?
> A. I did not *see any fight, no.*" (Emphasis ours)

It would be useful to review briefly the setting against which the petitioner spoke on March 8th. His organization, Young Progressives of America, had booked O. John Rogge into the public auditorium at Madison School for a speech, part of which would describe the case of six Negro boys who had been condemned to death for a crime of which Mr. Rogge, among others, claimed they were innocent. That permit had been cancelled the afternoon of the meeting by the Board of Education. The petitioner spoke at a public street meeting, designed not only to advise of the change in plans, whereby Mr. Rogge would speak at the Hotel Syracuse that night, but also to express his displeasure with the action taken by the public authorities in cancelling the permit for the public auditorium in Madison School. (R. 78)

We cannot deny that petitioner was outraged by this act. We cannot deny that he attempted to convey this feeling of outrage to his hearers, to parallel the cancelling of the permit with the unequal treatment given to Negroes in many areas. Obviously, his intent was to arouse his audience, to stir them up, to urge upon them a course of action that would prevent a recurrence of the peremptory cancellation of the permit, and help in the fight for equal rights for Negroes. That he was successful in exciting the crowd is a tribute not only to the soundness of his sentiments, but also to his effectiveness as a public speaker. That he annoyed some of his listeners and caused them to display their annoyance by mild vocal eruptions is not

surprising. Less surprising is the fact that he annoyed the police officers present. The petitioner did not appear at this public meeting to discuss the solar system, flowers or stamp collecting. He spoke on a provocative subject that mattered a great deal to him. He fully hoped and expected that his words would reach a warm response. He fully anticipated that some would disagree with him. As Mr. Justice Jackson stated so eloquently in *Board of Education vs. Barnette*, 319 U. S. 624, 642; ". . . but freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."

The preceding is not intended to be brazen or flippant. It is intended to bring the conduct of the petitioner and his words, and the conduct of the crowd, down into the bedrock of the constitutional guarantees encompassing all the acts and words of the petitioner and of the crowd on the night of March 8th.

> "As Chief Justice Hughes wrote in *DeJonge* v. *Oregon*, 299 U. S. 353, 365, 'It is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.
>
> Accordingly, a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though

not absolute, (*Chaplinsky* vs. *New Hampshire*, *supra*) is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that arises far above public inconvenience, annoyance or unrest. See *Bridges* vs. *California*, 314 U. S. 252, 262; *Craig* vs. *Harney*, 331 U. S. 367, 373."

Mr. Justice Douglas, for the majority, in *Terminiello* vs. *Chicago*, 337 U. S. 1.

"History has not been without periods when the search for knowledge alone was banned. Of this, we may assume, the men who wrote the Bill of Rights were aware. But the protection they sought was not solely for persons in intellectual pursuits. It extends to more than abstract discussion, unrelated to action. The First Amendment is a charter for government, not for an institution of learning. 'Free Trade in ideas', *means free trade in the opportunity to persuade to action, not merely to describe facts.* Indeed, the whole history of the problem shows it is to the end of preventing action, that repression is primarily directed, and to preserving the right to urge it that the protections are given." (Emphasis ours.)

Mr. Justice Rutledge, for the majority, in *Thomas* vs. *Collins*, 323 U. S. 516, 537.

Assuming, for the purpose of this discussion, that the conduct of the crowd is the petitioner's responsibility, not one bit of evidence is revealed from the detailed excerpts from the record above recounted, to show that the conduct or the temper of the crowd even remotely approached that in the *Terminiello* case, *supra*. No outeries, no violence, no serious complaints, no threats, no disorder, in fact, nothing to distinguish the crowd that congregated at the corner of So. McBride Street and Harrison Street in the City of Syracuse on March 8, from most crowds which as-

semble peaceably to hear a speaker; merely a timorous police officer, who, "figured it had gone far enough." (R. 25).

We concede that there was one threat of violence. Not by the petitioner, but by one man in the audience who approached one of the police officers and said, "If you don't get that 'son of a bitch' off, I will go over and get him off there myself." (R. 22). The duty of the police officer, at that moment, was clear. It was his duty at the very least, to reprimand the protestor and send him on his way, so that violence would be avoided, or, if necessary, to arrest him for threatening violence and threatening to take the law into his own hands. Threatening violence is a well-defined crime in the State of New York, covered by the same statute under which petitioner was convicted. Except in self defense, violence or threats of violence, are criminal acts, punishable under the law. Yet, the only duty the police officer saw, at that moment, as appears from the testimony at page 25, was, "at that time, when the gentleman (sic) came up and made the statement I testified to I figured it had gone far enough, so I went over to Mr. Feiner." One may well question whether, under the law, so far laid down in this case, freedom to speak has become the crime, and freedom to threaten violence lawful.

If the authorities fail in their duty to maintain peace and inadequately control (*Sellers* v. *Johnson* 163 F. 2d 877; 8th Cir. 1947), connive at, or actively encourage (*Hague* v. *CIO*, supra) the disruptive elements, they may not justify intervention to "preserve" order, by pointing to a danger which they have helped to bring about. Cf. 61 Harvard Law Review 537, 539 (1948); 52 Harvard Law Review 320, 321 (1938).

See also Mr. Justice Jackson dissenting in *Terminiello* v. *City of Chicago*, 337 U. S. 1, 34; "I do not think that the

Constitution of the United States denies to the states and the municipalities power to solve that problem in the light of local conditions, at least so long as danger to public order is invoked in bad faith, as a cover for censorship or suppression."

We are impelled to inquire whether it is criminal to speak in such a manner that the audience will be interested to discuss, one with the other, some for, some against. (R. 41). Whether it is criminal to speak to a crowd that pushes and shoves, but not to excess. (R. 41). Whether it is unlawful to speak to an audience that, "mills around back and forth." (R. 50). Whether it has become a crime to speak to an audience that discusses the speech pro and con without disorder. (R. 49). Or to a crowd that is restless, (R. 49) or to speak in such a manner that, "stirs up a little excitement." (R. 53).

A thoughtful postulation of the problem of the hostile audience as related to freedom of speech and assembly is found in 49 Columbia Law Review 8:1118 (1949). Since we do not subscribe to the conclusion that the audience here was hostile or presently or imminently violent, except in the minds of the Courts below, this discussion may bear no more than an academic relation to the case at hand. However, if this Court should find that some hostility of the audience has been proved, we assert that the degree of hostility here shown falls far short of that necessary to suppress the petitioner's right of free discussion. Whether a hostile audience may, under some circumstances, disturb this right, we express no opinion.

We surmise that it was not the conduct of the crowd, or the conduct of the petitioner, or his words, as such, that brought about his arrest; we suspect it was the unpopularity of his views, and the annoyance created by them in the minds of the police officers that caused his arrest.

This Court has long enjoined the suppression of unpopular, minority views.

> "Plainly, a community may not suppress . . . the dissemination of views because they are unpopular, annoying or distasteful. If that device were ever sanctioned, there would have been forged a ready instrument for the suppression of the faith which any minority cherishes, but which does not happen to be in favor. That would be a complete repudiation of the philosophy of the Bill of Rights." *Murdock* v. *Pennsylvania*, 319 U. S. 105, 116.

This Court has also held that the freedoms guaranteed by the First Amendment, to the extent that they are denied to one, are denied to all. This Court has said that the Constitution does not command orthodoxy of opinion, whether the issue be religious, political, economic or social. The intention is rather, to keep the channels of information and opinion completely open, however distasteful or even odious the views expressed may be to the prevailing opinion of the times.

> "Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good, as well as by evil men . . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard." *Board of Education* v. *Barnette*, 319 U. S. 624, 640.

4. *Petitioner's failure to stop speaking on request of the Police is not unlawful.*

Much has been made of the fact that the petitioner did not immediately respond to the request of the police officer to cease his talking. The police testified that it was necessary to request him to stop several times before placing him

under arrest. This incident may have taken two minutes, as testified to by Officer Flynn (R. 43) or four or five minutes as testified to by Officer Cook (R. 64), or about a minute as testified to by the petitioner's witnesses (R. 127). We can see no useful purpose in endless debate on this subject. If petitioner's conduct was lawful, the police officers had no right to break up his meeting. Whether they broke up the meeting by forcing him to cease his talk or by arresting him, is an evasion of the fundamental principles involved here. If the petitioner had a right to speak, then the police officers had no right to terminate the meeting, whether by request, by demand, by threats, or by arrest. He is charged with causing a crowd to congregate and speaking in an unlawful manner. He either had a right to speak as he did, or he had none. If he had that right, then he could not be interfered with either by request or by arrest. If he had no right to speak, then he was liable to arrest, whether he took two minutes or four minutes to submit.

That the police officers themselves were doubtful as to the correctness of their actions, is evidenced by their own statement that they originally arrested the petitioner for unlawful assembly and later changed the charge to disorderly conduct (R. 43). That their action was highly speculative is further shown by the police officer's testimony at page 41, wherein he said, after denying that there was a disturbance: "But we stepped in to prevent it from resulting in a fight. After all, there was angry muttering and pushing"

5. *The action of the police was not justified by clear and present danger.*

If the action of the police officers is to be justified at all, it is on the basis of preventing an imminent breach of the peace, caused by the words and conduct of the petitioner. The petitioner's speech and conduct will be discussed later.

Whether a breach of the peace was imminent may be determined only from the testimony we have set forth above, describing the conduct of the crowd. We submit that a police officer may not assume that a breach of the peace will occur because the speakers remarks are provocative, sufficiently so to cause the audience to discuss same "pro and con" (R. 49); or because there is a little, "pushing and shoving" (R. 41); or because there are two or three complaints (R. 25). If the police may adopt this line of reasoning, then no speaker is safe from censorship at the hands of a police officer who fears provocative discussions; who fears novel and unpopular views and who fears criticism of himself or of his superiors.

The police, as well as private citizens, are bound by the dictate of this Court, as enunciated in the "clear and present danger" doctrine. Obviously, police officers need not wait until a breach of the peace has occurred before acting. Nevertheless, if they act before the breach has occurred, they should be prepared to justify their actions under the rule of "clear and present danger."

In our view, a discussion of "clear and present danger" in this case, may be academic. A review of the testimony reveals that during the entire course of petitioner's talk, on the night of March 8, there was no "clear and present danger" of anything other than a modest amount of pedestrian inconvenience, and annoyance to a small group of dissenters.

A discussion of "clear and present danger" must relate to a "substantive evil." (*Bridges v. California*, 314 U. S. 252, 262)

> "In order to support a finding of clear and present danger, it must be shown either that immediate, serious violence was to be expected, or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated . . . To courageous,

> self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression." Concurring opinion of Justices Brandeis and Holmes, *Whitney* v. *California*, 274 U. S. 357, 377.

The testimony of the police officers, when measured against the definition of "clear and present danger" as laid down by this Court, reveals that the "clear and present danger" doctrine, as we have said, has no place in this case. This was a public meeting, peaceful from beginning to end. Dissenters? Admittedly. Complainers? Yes. Violence? No. Disturbance? No. Merely the opinion of the police officer that, "it had gone far enough" (R. 25).

To summarize, under that portion of the charge devoted to, "causing a crowd to congregate at the corner of Harrison and South McBride Streets in the City of Syracuse, New York," the record is barren of any act by the petitioner, or any acts on the part of the "crowd" to take the charge outside the language of Subdivision 4 of Section 722 of the Penal Law of the State of New York; "by his actions, cause a crowd to collect, except when lawfully addressing such a crowd." Nothing unusual, nothing untoward, except the opinion of the police officers that, "I figured it had gone far enough" (R. 25); that, "they were kind of restless" (R. 49), and "they were getting to the point where they would be unruly" (R. 50). Under the Constitution and the binding decisions of this Court, this portion of the charge has not been sustained.

B. "AND DID ACT IN SUCH A MANNER BY TALKING OVER A LOUD SPEAKER SYSTEM AS TO ANNOY, DISTURB, INTERFERE WITH AND BE OFFENSIVE TO OTHERS."

1. *Petitioner's use of a loud speaker system is not unlawful.*

Section 722 Subdivision 2 of the Penal Law of the State of New York, reads as follows:

> "Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others."

We do not deny that the petitioner made use of loud speaking equipment. It is conceded that his entire speech was delivered over a public address system. Except that the petitioner spoke in a loud, high-pitched voice (R. 25), there is nothing in the record specifically referring to the loud speaking equipment, except that he used same, and a description of same. As to his use of the loud speaker system to, "annoy, disturb, interfere with and be offensive to others," there is a complete absence of proof. We have previously conceded that his words undoubtedly caused annoyance to a portion of his audience, but whether this annoyance resulted from the words themselves, or the fact that they were broadcast over a public address system, is not made clear in the record. There is no proof that any of the residents of the area were annoyed, disturbed or interfered with by the use of loud speaking equipment, nor passersby, nor anyone.

This Court has said that, "any abuses which loud speakers create can be controlled by narrowly drawn statutes." *Saia* v. *N. Y.*, 334 U. S. 558. Section 722, Subdivision 2, can hardly be considered such a narrowly drawn statute. If this statute can be applied to the use of loud speaking equip-

ment, then there is sanctioned, "a device for suppression of free communication of ideas." *Saia* v. *N. Y.*, *supra*.

This statute, in the use of language, "to annoy, disturb, interfere with, obstruct or be offensive to others" is similar to the language of the statute struck down in the *Saia* case. There, the statute read, "it shall be unlawful for any person to maintain and operate . . . a loud speaker . . . which is so placed . . . that the sounds coming therefrom can be heard to the *annoyance, or inconvenience* of travellers, upon any street or public places or of persons in neighboring premises." (Emphasis ours.)

This Court, in finding this ordinance unconstitutional said:

> "For it establishes a previous restraint on the right of free speech, in violation of the First Amendment, which is protected by the Fourteenth Amendment against State action. To use a loud speaker or amplifier, one has to get a permit from the Chief of Police. There are no standards prescribed for the exercise of his discretion. The statute is not narrowly drawn to regulate the hours or places or use of loud speakers or the volume of sound to which they must be adjusted. The ordinance, therefore, has all the vices of the ones which we struck down in *Cantwell v. Connecticut*, 310 U. S. 296; *Lovell v. Griffin*, 303 U. S. 444; and *Hague v. CIO*, 307 U. S. 496."
>
> "The right to be heard is placed in the uncontrolled discretion of the Chief of Police. He stands athwart the channels of communication as an obstruction which can be removed only after criminal trial and conviction and lengthy appeal. A more effective previous restraint is difficult to imagine."

Though no permit is required in Section 722, nevertheless, the sanction of the police appears to be a necessary adjunct to the use of loud speaking equipment in this case. Let the police decide that the petitioner is using the loud

speaker system as to, "annoy, disturb, interfere with and be offensive to others," and arrest, conviction and lengthy appeal follow.

Like the first portion of the charge, "causing a crowd to congregate," the second portion, devoted to the use of loud speaking equipment, can hardly be sustained under the Constitution.

C. USE OF INSULTING AND DEROGATORY REMARKS CONCERNING PUBLIC OFFICIALS.

1. *Petitioner's words were not unlawful.*

The third and last portion of the charge states, "did make insulting and derogatory remarks concerning certain public officials in this community and elsewhere." Section 722, Subdivision 1, states:

> "Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior."

The testimony of the police officers accuses the petitioner of making the following remarks:

> "He was speaking in regard to John Rogge and the talk he was going to give later that night. He called Mayor Costello a champagne sipping bum and President Truman a bum. He referred to the American Legion as Nazi Gestapo agents. He also said the Fifteenth Ward was run by corrupt politicians and that horse rooms were operating". (R. 19).

also that, "The negro people do not have equal rights and should rise up and fight" (R. 22, 25, 42, 47, 52).

Petitioner's witnesses have denied that the petitioner made the remarks about Mayor Costello and President Truman ascribed to him by the police. However, for the

purpose of this discussion, but without admitting the truth of these accusations, we are willing to accept as true the proof offered by the police.

Admittedly, making reference to the Mayor as a "champagne sipping bum," and to President Truman as a "bum", is in extremely bad taste, and ineffective political campaigning. None the less, this Court has held language of this kind is not actionable on the part of the community. The leading case on this subject is *Cantwell* v. *Connecticut*, 310 U. S. 296. There, the defendant accosted two men on the street and played a record attacking all organized religion. He then singled out the Catholic Church for strictures couched in terms which naturally would offend not only persons of that persuasion, but all others who respect the honestly held religious faith of his fellows. The hearers were in fact, highly offended. One of them said he felt like hitting the defendant and the other that he was tempted to throw the defendant off the street. The Court there said:

> "The defendant's conduct, considered apart from the effect of his communication upon his hearers, did not amount to a breach of the peace. One may be guilty of the offense if he commits acts or makes statements likely to provoke violence or disturbance of good order, even though no such eventuality be intended.
>
> "Decisions to this effect are many, but examination discloses that, in practically all cases, the provocative language which was held to amount to a breach of the peace, consisted of profane, indecent, or abusive remarks directed *to the person of the hearer.*" (Emphasis ours.)
>
> "In the realm of religious faith and in that of political belief, sharp differences arise. In both fields, the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know it, at times resorts to exaggera-

tion, to *vilification of men who have been, or are prominent in church or state and even to false statements.* But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to the enlightened opinion and right conduct on the part of the citizens of a democracy." (Emphasis ours.)

Chaplinsky v. *New Hampshire*, 315 U. S. 568, laid down the rule that "fighting words" made directly to the face of the hearer, was actionable. "Fighting words" was defined as "what men of common intelligence would understand, to be words likely to cause an average addressee to fight . . . Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic, of plainly tending to incite the addressee to a breach of the peace . . . The statute as construed, does no more than prohibit the face to face words plainly likely to cause a breach of the peace by the addressee."

There is, of course, no proof that either Mayor Costello or President Truman were in the audience on the night of March 8th. In their absence, neither police officers nor private citizens are permitted to take up the cudgels on their behalf by causing the petitioner's arrest for making the alleged remarks.

This Court has held in *Bridges* v. *California*, *supra*, and *Pennekemp* v. *Florida*, 328 U. S. 331, that the publishing of derogatory remarks about the judge and jury did not create such a "clear and present danger" to the administration of justice as to permit punishment for contempt. This Court further stated ". . . that unless the writing precipitates a clear and present danger, in consequence of which justice will be affected, recourse of the aggrieved person is prosecution for libel."

2. *Petitioner's counseling of a course of action is not unlawful.*

The above discussion has no relevance to the petitioner's urging upon his audience, "to rise up and fight," or "rise up in arms and fight," for equal rights for Negroes. No apology need be made for so typically an American phrase as that. To construe this exhortation as an attempt to incite to riot or to counsel direct physical action by one race against the other or against duly constituted authority, is logic born out of hysteria, not reason.

Police Officer Flynn's answer to the question; "Did he at any time ask the Negro people to take action against the white people as such?" was "No, I did not hear him ask anything like that" (R. 42).

We have previously urged that the speech made by the petitioner on the night of March 8th was sharp, vigorous and designed to effect a course of action. Unlike the defendant in the *Terminiello* case, he did not vilify race and religion. He related what is a well-known circumstance in many areas of this country, that Negro people are discriminated against. He advised a course of action to help eliminate this discrimination. At no time did he urge Negro people to take action against white people. To counsel and advise action is not unlawful. "Free trade in ideas means freed trade in the opportunity to persuade to action, not merely to describe facts." *Thomas* v. *Collins*, *supra*.

That ideas which induce listeners to action are constitutionally protected was voiced in one of Justice Holmes' dissents later to become the majority view of this Court in *Thomas* v. *Collins*, *supra*; "every idea is an incitement. It offers itself for belief, and, if believed, it is acted on, unless some other belief outweighs it, or some failure of energy stifles the movement at its birth." *Gitlow* v. *N. Y.*, 268 U. S. 652.

In the absence of incitement to riot, quibbling over whether or not the petitioner used the language charged to him serves no useful purpose. No incitement was charged, none proven. Whether sound or unsound, temperate or intemperate, in good taste or in bad taste, whether vigorous or mild, the petitioner had a clear right, under the Constitution, so long as he escaped the injunction of the *Chaplinsky* case, to engage in free debate and free exchange of ideas, and certainly, at the very least, to use, in carrying out these ideas, the words with which he is charged. See *DeJonge* v. *Oregon*, 299 U. S. 353, 365; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Terminiello* v. *City of Chicago*, 337 U. S. 1.

We hold no brief for the right of anyone to use language connoting religious and racial bigotry. We do not espouse the cause of those who incite to riot. If this Court found the language in the *Terminiello* case, replete as it was with racial and religious bigotry, insufficient to uphold a conviction, if no incitement to riot were found in that case in the face of the turbulent conditions prevailing during the course of that speech, then how much less justification for a finding of unlawful language and incitement here.

This concludes our analysis of the charge and the testimony. We have sought to show that the basic charge against the petitioner, "in that he did then and there provoke and cause a breach of the peace," is completely bereft of proof. We have demonstrated that the supporting charges: "by causing a crowd to congregate," by "talking over a loud speaking system" and making "insulting and derogatory remarks" are not unlawful as such and were not made unlawful by the effect of these activities on those attending the meeting which took place on March 8th. Finding no breach of the peace at the meeting itself, the Courts below took refuge in the theory of imminent or possible breach of the peace. This theory, as applied by the Courts below, will be discussed in the next section of this brief.

II. The Trial Court Erroneously Interpreted the Evidence and the Applicable Constitutional Principles

A. THE TRIAL JUDGE ERRONEOUSLY INTERPRETED THE RULE OF CLEAR AND PRESENT DANGER.

The language of the Trial Court in ruling on the petitioner's motion to dismiss, at the end of the prosecution case, gives the key to its thinking on the standard of guilt employed here:

> "The basis of the action here, is not whether or not *disorderly conduct actually occurred*, but whether or not the circumstances furnished the occasion for a *possible* act or acts that would come within the classification of disorderly conduct." (Emphasis ours) (R. 71)
>
> ". . . the question is, whether or not, with this combination of circumstances, there was a possible occasion for a disorderly conduct as the officers appraised the situation there. I think that is the point here. If the combination of these things created a situation wherein the officers concluded that there was danger that a situation *might* arise that *could* involve disorderly conduct, then I would think that the officers would be not only acting within the realm of their duty, but I think it would be good judgment on the part of the officers to step in and try to avoid and head off any such development as that." (Emphasis ours) (R. 71)

Taking these words of the Trial Judge in the abstract, a vast difference can be seen between these words and the standard applied in *Bridges* v. *California*, *supra*, that "Freedom of speech, though not absolute, is nevertheless protected against censorship or punishment unless shown likely to produce a clear and present danger of a serious, substantive evil, that rises far above public inconvenience, annoyance or unrest." The Trial Judge's concern for a "possible act", that a situation "might arise", that "could

involve'' disorderly conduct, makes a shambles of the clear and present danger doctrine.

In marshalling the evidence in support of this theory, the Trial Judge, at the conclusion of the prosecution case, stated:

> ''The question is, whether the combination of circumstances there, the fact of the meeting (sic); the talk being delivered over the loud speaking apparatus, which in and of itself is perfectly proper; the attitude of the crowd as testified to by Officer Flynn; the angry muttering; the expression of this one man, who by that statement, indicated his attitude; and the remarks that the officers testified to that were overheard in this crowd.'' (R. 71)

These are the circumstances that transpired during the course of a thirty minute meeting on a street corner on March 8th. These are the acts for which the petitioner is held responsible and which led the Trial Judge to believe that a ''possible occasion for a disorderly conduct'' (R. 71) existed.

Enough discussion has preceded here, on the subject of ''angry muttering'' and the few expressions of dissent, so that further comment would be repetitious. Whether the ''angry muttering'' and the expressions of dissent would give rise to a breach of the peace, is highly speculative. To argue whether a speech resulting in ''angry muttering'' and expressions of dissent would end up peaceably or break up in a fight, makes a very interesting study in semantics. As a practical matter, a speech delivered to a sympathetic audience might have a peaceful result, the same speech delivered to a hostile audience might have a very unpeaceful result. The question then, is not whether the conduct of the listeners will give rise to a breach of the peace, but rather whether or not the words of the speaker will give rise to the breach. That they ''invite dispute . . . induce a condi-

tion of unrest, create dissatisfaction with conditions as they are, or even stir people to anger," *Terminiello* v. *City of Chicago, supra,* is no basis for suppressing that speech. The standards used by the Trial Judge, fall far short of this mandate.

B. THE TRIAL JUDGE DREW UNWARRANTED CONCLUSIONS FROM THE EVIDENCE

1. *The conclusion of the Trial Judge that Petitioner advocated violence and racial strife is unsupported.*

At the close of the entire case, and as part of his decision convicting the petitioner, the Trial Judge, discusses the substance of the petitioner's speech. He said:

> ". . . people who advocate change by violence and who divide a nation to conquer, and pit men against men, and class against class and race against race and color against color and religion against religion, should be denied the right of freedom of speech." (R. 137.)

And continuing:

> "I think that is a good, sound, sensible philosophy. I think our citizens should be permitted to exercise those liberties that Rabbi Friedman spoke about: the freedom of speech and the numerous other freedoms you have heard a good deal about, subject however, to some regard for the rights of others: *subject to other people's convenience; subject to other people's wishes.*" (Emphasis ours.) (R. 137.)

We have made a painstaking search of the record and have made references to many portions of it, so that the entire subject matter of the petitioner's speech, as testified to by the prosecutor's witnesses, might be clearly before this Court. We have found no word or phrase in the entire

record to indicate that the petitioner, either directly or by implication, advocated, "change by violence;" sought to "divide a nation to conquer;" pitted "men against men;" "class against class;" "race against race;" "color against color" and "religion against religion."

Notwithstanding our fear of becoming wearisome from repetition, the record discloses that the petitioner urged the Negroes in his audience to "fight for their rights." (R. 22, 25, 42, 47, 52), and that the petitioner did not counsel Negroes to act against whites (R. 42).

2. *The Trial Judge made freedom of speech subject to convenience and wishes of others.*

The Trial Judge's generous grant to the petitioner of the right of freedom of speech, "subject to other people's convenience; subject to other people's wishes," (R. 137) is a novel theory in our constitutional law. No purpose would be served in exploring it.

Near the conclusion of his decision, the Trial Judge sought to justify his theory that freedom of speech is, "subject to other people's convenience; subject to other people's wishes," by showing:

> ". . . that it was necessary for people attempting to pass up or down on that side of the street to go out into the roadway where vehicular traffic made it appear to the officers that some situation might result from that, whether dangerous or what, they noted that . . . They say there was pushing and muttering, indicating a state of unrest. They heard remarks from three different men in that group indicating a frame of mind which could be disturbing. They were asked as to how long you were going to be permitted to talk. One man came across the street and said to Officer Flynn, "if you don't get that so and so off there, I

will go over and get him down myself.'' The officers acted on these appeals at the last stage, after hearing you stress the inequalities and the unfair things you claimed you were disturbed about. They then heard you appeal to these people, to stand up and in arms or with arms and to fight.''

This, then, is the entire case against the petitioner. This, then, was the situation that, ''might arise that could involve disorderly conduct.'' (R. 71.)

These quotes from the trial Court's opinion are designed to show that the Trial Judge adopted, without material change, the theory of the police and of the prosecution. By police standards, a discussion of racial inequalities is unlawful. By police standards apparently, racial inequalities do not exist. We contend that it is common knowledge that racial inequalities exist and that they are not made to disappear by suppressing discussion of them. Racial inequalities are made to disappear only through full and free discussion which gives, ''the opportunity to persuade to action, not merely to describe facts.'' *Thomas* v. *Collins*, *supra*.

C. THE TRIAL COURT HELD A PROVOCATIVE SPEECH TO BE UNLAWFUL

One of the more disturbing conclusions of the Trial Court, chiefly because the Court of Appeals later adopted this conclusion as its own follows:

> ''I think that on the basis of the evidence here, that you *deliberately agitated* and that in every way that you could, you *goaded these officers* into action. They were right there on the opposite side of the street; you knew they were there . . . and you kept right on talking about *racial inequalities* with *this muttering; this angry muttering*. . . .'' (R. 140) (Emphasis ours.)

Whether the petitioner is charged with agitating his audience or agitating the officers is not clear. Unmistakably, he is accused by the Court of goading the officers to action, presumably because he continued to talk about racial inequalities while the "angry muttering" continued. This is truly an astounding conclusion.

It should be borne in mind first, that this "angry muttering" is no more than a pro and con discussion of the petitioner's speech. (R. 41.) The petitioner, while making a lawful speech, was not compelled to stop his speech because he succeeded in inducing "a condition of unrest," creating "dissatisfaction with conditions as they are" or even strirring "people to anger." *Terminiello* v. *City of Chicago*, *supra*. That he succeeded in evoking a sufficient response from his audience that they were impelled to discuss the speech between themselves pro and con is a tribute to his subject matter and to his skill as an orator. He was not compelled at that time to cease his talk or to change the subject to one of lesser moment. ". . . freedom to differ is not limited to things that do not matter much." *Board of Education* v. *Barnette*, 319 U. S. 624, 642.

Except insofar as the above is concerned, we find no support in the record for the conclusion that the petitioner "goaded the police officers to action." It was not the function of the police officers to be "goaded" one way or another. So long as the petitioner's speech was protected by constitutional guarantees, the subject matter thereof should have left the police officers cold. They were not present as members of the audience. The speech was not designed to influence them one way or another. That it irritated them, aroused them, or annoyed them, is not material. It was not their function to protect the audience from the doctrines espoused by the speaker.

> "The very purpose of the First Amendment is to foreclose public authority from assuming a guardian

> ship of the public mind through regulating the press, speech and religion. In this field, every person must be his own watchman for truth because the forefathers did not trust any government to separate the true from the false for us." Concurring opinion of Mr. Justice Jackson in *Thomas vs. Collins*, 323 U. S. 516, 545.

Accordingly, it was not the duty or the right of the police officers to protect the audience from a discussion of racial inequalities, even though there was "angry muttering." Accordingly, their frustration at having to stand by while these ideas were being discussed, though it may be considered by the Trial Court to be "goading," is nevertheless nothing for which the petitioner may be held criminally responsible.

D. THE TRIAL JUDGE PERMITTED HIS OWN BELIEFS TO CONTROL HIS DECISION

Revealing also is the last paragraph of the Trial Judge's opinion:

> "I haven't much respect for the philosophy you endorse or for the remarks you made on that night in question. I think that talk of yours was designed to do the very things that Rabbi Friedman has spoken about; to line up class against class and race against race, and that philosophy of yours will never prevail in this country." (R. 141.)

Finding no support in the record that the petitioner's speech sought to "line up class against class and race against race," we conclude that, in the mind of the Trial Judge, a discussion of racial inequalities is tantamount to lining up "class against class and race against race." The conclusion is inescapable that in the mind of the Trial Judge, a public discussion of racial inequalities is unlaw-

ful. This philosophy needs to be struck down by this Court.

III. The Court of Appeals' Decision Is Based upon Unsupported Findings and Incorrect Interpretation of the First and Fourteenth Amendments.

It is against the background of the evidence which we have incorporated in considerable detail in this brief, that the Court of Appeals' opinion should be examined. We will show that there is not only a wide divergence between the evidence in the record and the evidence as accepted by the Court of Appeals, but also a considerable divergence between this evidence and the conclusions drawn from it.

A. PETITIONER'S INTENT WAS IMPROPERLY INFERRED

It was not until the case reached the Court of Appeals, that the question of petitioner's intent was considered. Introductory language of Section 722 reads as follows:

> "Any persons who, with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts, shall be deemed to have committed the offense of disorderly conduct."

In the Trial Court, more attention was given to the possibility of a breach of the peace occurring, rather than to the intent of the petitioner to commit same. The Court of Appeals preferred to rely more heavily on the intent of the petitioner. Accordingly, the Court of Appeals, on the question of intent, stated:

> "The statement made by the trial judge to defendant that "on the basis of the evidence here . . . you deliberately agitated . . . and in every way that you could, you goaded these officers to action"

was clearly a finding that defendant, by his conduct under the circumstances, intended to provoke a breach of the peace" (R. 157).

Previous comment has been made by us on the subject of "agitating and goading" the officers to action. We do not feel bound to accept this finding of the Trial Judge, as the Court of Appeals did, since there is no support in the record for it. It is undeniable that the record discloses no agitation or goading of the police officers, and that, even if it does, nothing unlawful is proved thereby.

B. PETITIONER'S GUILT MAY NOT BE DETERMINED ABSTRACTLY

Coupled with the finding of intent, is the equally unsupported finding by the Court of Appeals:

> "Certainly, defendant acted, 'in such a manner as to annoy, disturb, interfere with, obstruct or be offensive to others,' within the meaning of Subdivision 2, and such conduct, in conjunction with an intent to provoke a breach of the peace, is sufficient in itself to establish the offense of disorderly conduct" (R. 157, 158).

This has also been commented on previously and requires no repetition. We submit that, even though the petitioner, in the abstract, acted, "in such a manner as to annoy . . . ," none the less, while speaking under the rights guaranteed him by the First and Fourteenth Amendments, Section 722 must give way. This Court, speaking through Mr. Justice Roberts in *Schneider* v. *Irvington*, 308 U. S. 147, 161, said:

> "This Court has characterized the freedom of speech and that of the press as fundamentally personal rights and liberties. The phrase is not an empty one and was not lightly used. . . ."
>
> "In every case, therefore, where legislative abridgment of the rights is asserted, the Courts should be

> astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulations directed at *other personal activities* but be insufficient to justify such as diminishes the *exercise of rights so vital to the maintenance of democratic institutions*" (Emphasis ours).

We assert, that, though acting, "in such a manner as to annoy . . ." may be criminal in some circumstances, it was not so here, in the light of the applicable constitutional guarantees. As Mr. Justice Murphy, in *Thornhill* v. *Alabama*, 310 U. S. 88, 95, 96 said:

> "It is imperative that, when the effective exercise of these rights is claimed to be abridged, the Courts should 'weigh the circumstances', and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations."

The distinction was made explicit in Mr. Justice Jackson's opinion in *Board of Education* v. *Barnette*, 319 U. S. 624, 638, 639.

> "The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. *The right of a state to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect*" (Emphasis ours).

C. FAILURE TO CEASE SPEAKING AT REQUEST OF POLICE WAS NOT UNLAWFUL

The Court of Appeals relies also on the fact that the petitioner refused "to accede to the requests of the police officer within the scope of his lawful authority . . ." (R. 158). Our earlier discussion has noted that the police officers had no more right to arrest the petitioner than to stop the meeting. Once it is conceded that the petitioner had a lawful right to speak at the street corner in question, and that his words did not exceed the bounds of lawful conduct laid down by this Court, it is immaterial whether the petitioner acceded to the requests of the police officer or not. The police have no right to break up a lawful meeting, whether by stopping the speaker or arresting him. No question of acceding to the request of the police officer is involved.

According to the arresting officer, his original purpose was "to get him to break the congregation up—that is the reason" (R. 42). Thus, had petitioner acceded forthwith, the officer's mission would have been accomplished. The ultimate arrest gives no greater sanctity to the officer's action. Obviously, the most direct means of placing in issue the validity of the request, is to refuse to honor it.

D. THE CONDUCT OF THE CROWD DID NOT MAKE PETITIONER'S SPEECH UNLAWFUL

In support of its contention that the constitutional guarantees do not apply, the Court said: ". . . . we have a situation in which, on a public street, a portion of defendant's audience became enraged and aroused at his utterances" (R. 159). That they became aroused is not disputed; that they became enraged is open to serious question. Furthermore, reference need only be made to the language of the

Terminiello case *supra*, where it was held that a speech which "stirs people to anger" is not unlawful.

"The crowd became restless and potentially unruly" (R. 159). Again, that the crowd became restless is not denied; nor is it unlawful. That it was "potentially unruly," is open to doubt. The "unruly" character of the crowd is mentioned once in the entire record in the testimony of Police Officer Cook (R. 50). Objection to its competency was sustained on the ground that it was not sufficiently specific (R. 50), and it is not legitimately a part of the record.

The opinion goes on: "It filled the sidewalk and spilled out into the adjacent thoroughfare, obstructing and impeding both pedestrian and vehicular traffic" (R. 159). Ten pedestrians walked in the roadway (R. 32). There is nothing in the record as previously indicated, to show that any vehicular traffic was interfered with. The sole reference to vehicular traffic was in the testimony of Police Officer Cook, that when he arrived at the scene, he "slowed down pretty near to a stop" (R. 49). Nor does the record show that the crowd "spilled out into the thoroughfare." The listening audience was on the sidewalk (R. 20).

The Court of Appeals further concluded that "an imminent danger of a breach of the peace, of a disturbance of public order, *perhaps even of riot*, was threatened" (R. 155) (Emphasis ours).

We do not agree that the Court of Appeals had reason to fear a riot from a condition described by the police as an "angry muttering" (R. 20), meaning pro and con discussion (R. 41), and some pushing and shoving, but not to excess (R. 41), and one objector who threatened to take the law in his own hands (R. 22). Not even the Trial Court,

whose predisposition was quite apparent, felt it necessary to describe the events of March 8, in terms of a possible riot.

Not only riot, but "an eruption of civil strife," appeared to the Court of Appeals to be imminent. One searches the record in vain to find justification for this conclusion:

> "Where both the audience and the speaker are rapidly proceeding toward an eruption of civil strife—where indeed, both seem to be working up to a pitch where serious disorder might well be expected—the power and duty of the State to punish the speaker who refuses to desist after appropriate warning, is clear" (R. 159).

We are constrained to believe that this conclusion, unsupported by the record is more disturbing because of its restrictive character, than the words uttered by the petitioner on the night of March 8th. Some might conclude that the "angry muttering," the discussion "pro and con," the mild amount of "pushing and shoving," referred to above, might lead to "an eruption of civil strife." If conclusions of this nature are to serve as guideposts in the field of free speech, then indeed speech is far from free. See also our discussion of the hostile audience, *supra*.

Additional comment on the statement of the Court of Appeals that, "the power and duty of the state to punish the speaker who refuses to desist after appropriate warning, is clear" (R. 159) is unnecessary.

We cite it as additional proof of the Court's preoccupation with the belief that a meeting may be lawfully broken up without arrest, and that the refusal of the speaker to desist is sufficient grounds for his arrest. With this point of view, we have several time d' agreed. We maintain that, the speech of the petitioner being lawful, the police had no right to break it up, and that their request to the speaker to stop, being unlawful, could not give rise to an arrest.

E. A PROVOCATIVE SPEECH IS NOT UNLAWFUL

The Court of Appeals continued, "we do not think, under those circumstances, that defendant had a constitutional right to disregard the police officer's word of warning with impunity and to continue to blare out his provocative utterances over loud speakers to a milling, restless throng composed of hostile and sympathetic listeners" (R. 159).

Here again, the Court of Appeals seeks to reduce freedom of speech to the freedom to talk about unprovocative subjects, and not, as this Court has said in *Board of Education* v. *Barnette*, 319 U. S. 624, 642: "Freedom to differ is not limited to things that do not matter much."

That there was a small amount of "milling and restlessness" and that the audience was "hostile and sympathetic" may be conceded, without admitting that same took place. Speaking to such an audience requires no apology. See *Terminiello* v. *City of Chicago, supra.*

F. MOTIVES OF POLICE ARE IMMATERIAL

The Court of Appeals concluded it was bound by the finding of the Trial Court, "that the officer was motivated solely by a proper concern for the preservation of order and the protection of the general welfare . . ." (R. 160). We do not regard the motive of the police officer as an important factor. In our view, it is the function of the Court, not to determine his motive, though it be eminently pure, but to determine whether or not, on the evidence, there was justification for his act.

The Court of Appeals does give some recognition to this factor when it couples its finding of motivation with the following justification:

> ". . . in the face of an actual interference with traffic and an imminently threatened disturbance of the peace of the community" (R. 160).

We have discussed several times, the condition of traffic in the area of the meeting. We have brought to the attention of this Court, that, by the police officer's own testimony, no more than ten pedestrians were discommoded (R. 32, 33), and that not a single motor vehicle, other than that of one of the police officers, was remotely interfered with (R. 49). The Court of Appeals did not refer to this as an imminent or possible interference with traffic. It called it specifically "an actual interference with traffic" (R. 160). This is not supported by the record.

Insofar as "an imminently threatened disturbance of the peace of the community" (R. 160) is concerned, this is answered by the Court of Appeals in the next paragraph of its opinion. "The intolerance of a hostile audience may not, in the name of order, be permitted to silence unpopular opinions." (R. 160).

The record, though it contains such phrases as, "milling around," (R. 50); "some pushing and shoving, but not to excess" (R. 41); "angry muttering, meaning pro and con discussion" (R. 41), does not support a finding that a disturbance was "imminently threatened." We hesitate to indulge in further argumentation on this score. We merely restate that the record is equally filled with references to "there was no disturbance" (R. 41); "no fighting" (R. 60); "the people were standing around listening to the speech" (R. 49, 50), "the crowd was quiet" (R. 26).

Completely unsupported by the record is the finding of the Court of Appeals that, "the speaker (was) deliberately agitating and *goading the crowd* and the police officers to action." (Emphasis ours.) (R. 160.) We have previously discussed the subject of "goading the police officers." We find nothing in the decision of the Trial Judge to indicate a finding that the speaker "goaded" the crowd to action (R. 140). The testimony of the police officers, if we may

be permitted further repetition on this subject, is that the petitioner urged his audience to "rise up and fight for equal rights for Negroes" (R. 52). If this is goading, perhaps so. None the less, as has been amply demonstrated, advising, counseling, goading, if you will, into a course of action, so long as this course of action is lawful, is protected by the Constitution. *Thomas* v. *Collins, supra.*

The Court of Appeals disposed of the *Terminiello* case in its concluding paragraph. In the view of the Court of Appeals, the *Terminiello* case was mistakenly relied on by the petitioner for the reason that, "it there appeared that the speech of Terminiello was delivered in a private hall or auditorium and not upon the public street" (R. 160). We are not aware that the *Terminiello* decision may be so limited. According to the dissenting opinion of Mr. Justice Jackson, the auditorium, at which Terminiello spoke, was filled with over eight hundred persons. Outside the auditorium, a crowd of over one thousand persons was gathered to protest against the meeting. Terminiello addressed the audience (the address is set forth at length in the opinion of Mr. Justice Jackson) along the following lines:

> "Fellow Christians and I suppose there are some of the scum got in by mistake, so—I want to tell a story about the scum:—Now, this danger which we face—let us call them Zionist Jews, if you will, let's call them Atheists, Communist, Jews or Zionist Jews—. It is the same kind of tolerance, if we said there was a bed bug in bed, "we don't care for you", or if we looked under the bed and found a snake and said, "I am going to be tolerant and leave the snake there." We will not be tolerant of that mob out there. We are not going to be tolerant any longer."

During the course of the address, members of the audience responded with cries of, "yes, the Jews are all killers—murderers;" "if we don't kill them first they will kill us;"

"kill the Jews;" "dirty kikes." Outside the auditorium, violence and cat-calling occurred.

We hold no brief for the right of Terminiello to act and speak in this manner. We are not called upon for an opinion on this question. We do feel, that the admonition of the Court of Appeals, that the petitioner, "so inflamed and agitated a mixed audience of sympathizers and opponents, that in the judgment of the police officers present, a clear danger of disorder and violence was threatened," (R. 161), would apply with great force to Terminiello.

We are aware of the principle upon which the *Terminiello* case was decided. In our opinion, this Court did not pass upon the right of Terminiello to act and speak in the manner above described. None the less, this Court, in the *Terminiello* decision, did say:

> "That freedom of speech . . . is nevertheless protected against censorship or punishment, unless *shown* likely to produce a *clear and present* danger of a serious substantive evil that arises far above public inconvenience, annoyance, or unrest." *Bridges vs. California*, 314 U. S. 252, 262; *Craig vs. Harney*, 331 U. S. 367, 373. There is no room under our Constitution for a *more restrictive view.*" (Emphasis ours.)

G. THE COURT WAS WRONG IN USING THE JUDGMENT OF THE POLICE OFFICERS AS A TEST

Although we regard the term "shown likely" to be more restrictive than the rule expounded in *Schenck v. U. S.*, 249 U. S. 47; ". . . whether the words used *create* a clear and present danger," (Emphasis ours), nevertheless, never has this Court said that "clear and present danger," is determined by "the judgment of the police officers present" (R. 161). It is our understanding that "clear and present danger" is "shown likely" to be produced by the evidence, and not by "the judgment of the police officers." This

Court has said in the *Terminiello* case, "there is no room under our Constitution for a more restrictive view." See also the opinion of Judge Sanborn for the Court of Appeals for the 8th Circuit in *Sellers* v. *Johnson*, 163 F. 2nd, 877, 881, on the relationship between liberty under the First Amendment and the possibility of disorder:

> "The theory that a group of individuals may be deprived of their constitutional rights of assembly, speech and worship if they have become so unpopular with, or offensive to, the people of a community, that their presence in a public park to deliver a Bible lecture is likely to result in riot and bloodshed is interesting, but somewhat difficult to accept. Under such a doctrine, unpopular political, racial and religious groups might find themselves virtually inarticulate. Certainly the fundamental rights to assemble, to speak and to worship cannot be abridged merely because persons threaten to stage a riot or because *peace officers believe or are afraid that breaches of the peace will occur if the rights are exercised*" (Emphasis ours).

If, for no other reason, this decision of the Court of Appeals of the State of New York should be struck down on that account.

In *Board of Education* v. *Barnette, supra*, at pages 638, 639 Mr. Justice Jackson said:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, *to place them beyond the reach of* majorities and *officials* and to establish them as legal principles to be applied by the Courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." (Emphasis ours.)

II. THE COURT APPLIED THE RULE OF CLEAR DANGER RATHER THAN CLEAR AND PRESENT DANGER

Finally, we do not accept as valid, the Court of Appeals reference to a "clear danger of disorder and violence" (R. 161). The danger must be clear and present. Being clear alone will not suffice. As Mr. Justice Brandeis explicitly said in *Whitney* v. *California*, 274 U. S. 357, 376, "to justify suppression of free speech . . . there must be reasonable ground to believe that the danger apprehended is imminent." This is indicative of the fact that the words incorporated in the clear and present danger doctrine by the *Schenck* case, each have a meaning. There is no authority under our Constitution for the Court of Appeals to adopt "a more restrictive view." See *Terminiello* v. *Chicago*, *supra*.

In *Bridges* v. *California*, *supra*, the Court, after reviewing the cases which have applied the clear and present danger test, stated at page 263:

> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

In *Craig* v. *Harney*, 331 U. S. 367, 376, the Court pointed out that: "the danger must not be remote or even probable; it must immediately imperil." Moreover, there must be a

"solidity of evidence" (*Pennekamp* v. *Florida*, 328 U. S. 331), and the prosecution must prove beyond "a reasonable doubt", that the exercise of the First Amendment right leads to a clear and imminent danger of a substantive evil, within congressional power. *Hartzel* v. *U. S.*, 333 U. S. 680.

The Court of Appeals thus rejected the fundamental principle of the First Amendment, that liberty of expression, except in certain narrowly defined circumstances is no menace, but a democratic safeguard.

IV. Section 722 of the Penal Law of the State of New York as Applied to the Petitioner, Fails to Provide an Ascertainable Standard of Guilt in Violation of the Fourteenth Amendment of the Constitution of the United States.

In denying petitioner's motion to dismiss at the close of the prosecution's case, the Trial Judge expressed his theory of the legal rule applicable to the street meeting and petitioner's speech as follows: "The basis of the action here is not whether or not disorderly conduct actually occurred, but whether or not the circumstances furnished the occasion for a probable act or acts that would come within the classification of disorderly conduct . . . if the combination of these things created a situation wherein the officers concluded that there was danger that a situation *might* arise that *could* involve disorderly conduct, then I would think that the officers would be not only acting within the realm of their duty, but I think it would be good judgment on the part of the officers to step in and try and head off any such development as that" (R. 71). (Emphasis ours.)

A substantially similar standard was employed by the Trial Judge in finding petitioner guilty at the close of the entire case (R. 139, 140).

The Court of Appeals by its affirmance, upheld this supposed standard of guilt employed by the Trial Judge. This construction and application of Penal Law, Section 722 by the Courts below, must be regarded for constitutional purposes, as incorporating this "standard of guilt," applied by the Court below, into the statute. *Terminiello* v. *City of Chicago*, 337 U. S. 1; *Winters* v. *New York*, 333 U. S. 507, 514.

It is clear that the statute, as thus construed and applied below to convict petitioner, deprived petitioner of his right to procedural due process under the Fourteenth Amendment of the Constitution of the United States as defined in a long line of Supreme Court decisions. This Court has repeatedly enunciated the established principle that a penal statute which does not establish a clear, unambiguous and ascertainable "standard of guilt" denies due process of law. *Connolly* v. *General Construction Co.*, 269 U. S. 385; *Small* v. *American Sugar Refining Co.*, 267 U. S. 231; *U. S.* v. *Cohen Grocery Co.*, 255 U. S. 81; *Lanzetto* v. *New Jersey*, 306 U. S. 451.

The most recent decisions of this Court further emphasize that a vague and indefinite statute in the constitutionally preferred area of freedom of speech, press and association is void "on its face." *Winters* v. *New York*, 333 U. S. 507; *U. S.* v. *CIO*, 355 U. S. 104. This Court has held that "it is settled that a statute so vague and indefinite in form and as interpreted, as to permit within the scope of its language, the punishment of incidents fairly within the protection of the guarantee of free speech is void on its face as contrary to the Fourteenth Amendment." *Stromberg* v. *California*, 283 U. S. 359, 365; *Herndon* v. *Lowry*, 301 U. S. 242, 258.

"Failure of a statute limiting free speech to fair notice of what act will be punished and such a statute's inclusion of prohibitions against expressions protected by the principles of the First Amendment, violates the accused rights

under procedural due process and freedom of speech and press." *Winters* v. *New York*, 333 U. S. 507, 509.

By the affirmance of the petitioner's conviction by the Court of Appeals, any person henceforth addressing a public assemblage of any kind on a controversial issue must do so at his peril, for he can have no possible way of knowing whether some police officer, disapproving of his remarks may conclude that, "the circumstances furnished the occasion for a probable act or acts what would come within the classification of disorderly conduct." (R. 71), and whether there exists, "a danger that a situation might arise that could involve disorderly conduct" (R. 71).

Such a vague and nebulous standard of guilt brings the statute as interpreted and applied below, within the condemnation of the above decisions of this Court and constitutes a denial of due process in violation of the Fourteenth Amendment.

Conclusion

The petitioner is a Syracuse University student, under sentence of thirty (30) days in prison. His "offense" is that he exercised his right to speak his mind free and openly. He spoke out against conditions which mattered a great deal to him. He denounced the authorities of the community in wheih he was then living, for refusing to permit a speaker of his choice to speak in a public auditorium. He condemned the authorities of this community for permitting racial discrimination to exist. He urged both Negroes and Whites to join together in a course of action which would tend to eliminate these conditions. That perhaps, was his real "offense".

Though it is important that this young University student, as a result of his speech on the night of March 8, 1949,

was expelled from the University, and suffered a conviction and a sentence of thirty (30) days imprisonment, of far overriding importance are the consequences of this act on the civil liberties of people all over this Nation. Today it is a much too frequent occurrence that people are denied the right to meet on the streets of their community to discuss a subject of interest to them and their fellow citizens. Too often, having been denied the right to meet and speak, they are similarly denied the right to meet to protest the denials of these rights. All over this Nation, local communities are using their obligation to maintain peace and quiet as an excuse to suppress the discussion of unpopular doctrine. To date, the heavy hand of local legislative and law enforcement bodies has not been stayed as it descends to crush free discussion on the streets and in the parks of their cities, towns and villages.

The issue here, then, is not merely whether the petitioner shall remain expelled from his university status and whether he should go to jail for thirty (30) days, but whether our traditions of due process of law and freedom of speech and assembly will be vindicated before the people of this Nation. The issue is, in the words of Mr. Justice Murphy in *Martin* v. *City of Struthers*, 319 U. S. 141, 151, whether: "Freedom of (speech) has a higher dignity under the Constitution that municipal or personal convenience. In these days, free men have no loftier responsibility than the preservation of that freedom. A Nation dedicated to that ideal will not suffer, but will prosper in its observance."

So, too, apply the words of Mr. Justice Cardozo: "The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in Constitutions, and conse-

erating to the task of their protection a body of defenders." Cardozo, The Nature of the Judicial Process 92 (1921).

We submit this case in the words of this Court in *Chambers v. Florida*, 309 U. S. 227, 241: "No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution —of whatever race, creed or persuasion."

We ask this Court to extend to this young university student the rights under our Constitution which have until now been denied him. We submit that this Court should reverse the judgment below and direct that the information be dismissed.

Respectfully submitted,

SIDNEY H. GREENBERG,
Attorney for Petitioner;
Office & P. O. Address:
715 State Tower Bldg.,
Syracuse 2, New York.

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BRIEF ON MERITS

No. 93

Supreme Court of the United States

October Term 1949

IRVING FEINER,

Petitioner,

—*vs.*—

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Writ of Certiorari to the Court of Appeals State of New York

BRIEF FOR THE RESPONDENT.

JESSE E. CANTOR,
District Attorney, Onondaga County, N. Y.

DAN J. KELLY,
Assistant District Attorney,
Onondaga County, N. Y.

F. N. SPAULDING LAW PRINTING CO., SYRACUSE, N. Y.

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IN THE

Supreme Court of the United States

October Term 1950

No. 93

IRVING FEINER,

Petitioner,

—*vs.*—

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

---

BRIEF FOR THE RESPONDENT IN OPPOSITION TO WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

OPINIONS BELOW

The Opinion of the Court of Appeals of the State of New York is reported at 300 N. Y. page 391
See also Transcript of Records page 153
See also within 129-139

The Opinion of Leo W. Breed, County Judge of Onondaga County, New York, was not reported
See Transcript of Record, page 145
See within 125-128
The Opinion of Hon. William H. Bamerick, Judge, Court of Special Sessions, City of Syracuse, New York, was not reported
See record, pages 136 to 141
See also within 30-37

JURISDICTION

The Judgment of the Court of Appeals of the State of New York affirming the judgment appealed from was made and entered at Albany, New York on the 2nd day of March, 1950. A petition for a Writ of Certiorari was filed with this court by petitioner on the 7th day of March, 1950, and the petition was granted by this court on the 29th day of May, 1950.

QUESTION PRESENTED

Whether the conviction of the petitioner, Irving Feiner, in the Court of Special Sessions of the City of Syracuse, County of Onondaga, State of New York, on the charge of Disorderly Conduct in the violation of Section 722 of the Penal Law of the State of New York was an abridgment of petitioner's rights of freedom of speech and freedom of assembly as guaranteed by the First Amendment and the Fourteenth Amendment of the Federal Constitution.

STATUTE INVOLVED

The Statute involved is Section 722 of the Penal Law of the State of New York and is as follows:

"Section 722. DISORDERLY CONDUCT.

Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

1. Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior;

2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;

3. Congregages with others on a public street and refuses to move on when ordered by the police;

4. By his actions causes a crowd to collect, except when lawfully addressing such a crowd;

5. Shouts or makes a noise either outside or inside a building during the night time to the annoyance or disturbance of any considerable number of persons;

6. Interferes with any person in any place by jostling against such person or unnecessarily crowding him or by placing a hand in the proximity of such person's pocket, pocketbook or handbag;

7. Stations himself on the public streets or follows pedestrians for the purpose of soliciting alms, or who solicits alms on the public streets unlawfully;

8. Frequents or loiters about any public place soliciting men for the purpose of committing a crime against nature or other lewdness;

9. Causes a disturbance in any street car, railroad car, omnibus or other public conveyance, by running through it, climbing through windows or upon the seats, or otherwise annoying passengers or employees therein;

10. Stands on sidewalks or street corners and makes insulting remarks to or about passing pedestrians or annoys such pedestrians;

11. Is engaged in some illegal occupation or who bears an evil reputation and with an unlawful purpose consorts with thieves and criminals or frequents unlawful resorts.

12. In any prosecution under sub-division eleven of this section the fact the defendant is engaged in an illegal occupation or bears an evil reputation and is found consorting with persons of like evil reputation, thieves or criminals shall be prima facie evidence that such consorting was for an unlawful purpose.

STATEMENT.

This is a Writ of Certiorari granted May 29th, 1950, to review the judgment of the Court of Appeals of the State of New York entered March 2nd, 1950, affirming the judgment of conviction of the petitioner. The appeal to the Court of Appeals of the State of New York was on the certificate of Hon. Edmund H. Lewis, Judge of the Court of Appeals, certifying an appeal to the Court of Appeals under date of August 15th, 1949, from the affirmance by the Hon. Leo W. Breed, County Judge of Onondaga County, New York, on August 5th, 1949, of the conviction of the above named petitioner on the 6th day of May, 1949, in the Court of Special Sessions of the City of Syracuse, New

York, following a trial had in said court on the 5th and 6th days of May, 1949, before the Hon. William H. Bamerick, Judge of the Court of Special Sessions, at the close of which said trial the petitioner was found guilty of the offense of Disorderly conduct in violation of Section 722, Sub-division 2 of the Penal Law of the State of New York and on which said conviction he was, on the 9th day of May, 1949, sentenced to a term of thirty days in the Onondaga County Penitentiary and from which sentence appeal was taken. The petitioner was admitted to bail pending the appeal to the County Court of Onondaga County which said court affirmed the conviction on August 5th, 1949. The order of affirmance being entered in the Onondaga County Clerk's Office on August 8th, 1949. The case was certified to the Court of Appeals as above stated. Both the appellant, the petitioner herein, and the People submitted briefs in January, 1950, and by unanimous decision the Court on March 2nd, 1950, affirmed the judgment of conviction. On March 8th, 1950, Judge Lewis continued the bail until not later than April 3rd, 1950, to enable the petitioner to apply for the Writ of Certiorari herein, which petition was filed with the Clerk of the Supreme Court of the United States on the 17th day of March, 1950, and the petition for Writ of Certiorai granted May 29th, 1950, and to which said Writ the within brief is directed.

FACTS.

On the 8th day of March, 1949, the defendant-appellant was addressing an open-air meeting under the auspices of the Young Progessives of America at the intersection of South McBride Street and Harrison Street in the City of Syracuse. The purpose of the meeting was, as evidence

discloses, to recruit an audience for another meeting to be held at a later hour on the same day at the Hotel Syracuse in the City of Syracuse, New York, which meeting was to be addressed by one John Rogge. A permit previously given to hold the meeting in the Auditorium of Madison School had been revoked by Syracuse city officials and the place of the meeting had been changed to the ballroom of the Hotel Syracuse of Syracuse, New York.

At approximately six-thirty P. M. on the 8th day of March, 1949, a call, the source of which is unknown, was received at the Syracuse Police Station by Captain Irving Blanchard, the captain on duty, following which call, he detailed two police officers in separate cars to the intersection of South McBride Street and Harrison Street in Syracuse, New York, to investigate and report back to him. Upon the arrival of the police officers at this street intersection, they found a crowd of approximately seventy-five persons assembled on the west side of South McBride Street and to the north of the intersecting street, Harrison. A car was parked on the west side of South McBride Street some thirty-five or forty feet north of Harrison Street. This car was equipped with a public address system with loud speakers. A man, later identified as Irving Feiner, was standing on a box to the immediate west of the car and between the west curb of South McBride Street and the sidewalk on the west side of the same street. Mr. Feiner, using a hand microphone, was addressing the crowd through the public address system attached to the parked car.

He was, when the officers arrived, referring to John Rogge and the speech which he would make at the Hotel Syracuse that evening. Without any apparent connection

with the John Rogge speech, Irving Feiner lauched an attack on public officials in general and indulged in a bitter attack on the Mayor of the City of Syracuse, the Mayor of New York City, the President of the United States, the American Legion and officials of the Fifteenth Ward of Syracuse, New York, in which ward his address was being made. The meeting being addressed was composed of both colored and white people and the location was in a section of the city where a colored population predominates.

Among other things, the defendant-appellant, Irving Feiner, asserted that the Mayor of the City was indifferent to the needs and wants of the colored people who were not being given their rights as citizens, stressing throughout what he termed the indifference of public officials to their plight and in this connection he attacked public officials generally. The officers listening to the speech of Feiner patiently. They made no interference until such time as they observed from the action and comment of the crowd that a continuance in the same vein might lead to a breach of the peace. They recognized the right of free assembly and free speech even though intemperate and insulting and made no move to interfere until the results of his remarks were made evident by the restlessness and comment of the audience. Complaints were made by members of the crowd who were listeners to the speech as to how long they must stand for such remarks and the police were questioned as to whether or not they couldn't handle the situation, pedestrians were being forced into the street, vehicular traffic was being interferred with and the crowd was evidencing bad temper. The officers then mixed with the crowd and observed pushing, shoving and angry mutterings. One list-

ener going so far as to tell the police that if they, the police, didn't get the speaker off the box that he, himself, would do so. With the crowd in an evidently bad mood, Feiner made a plea to the colored people to rise in arms and fight for their rights. The officers, sensing the inflammatory effect of this last urging by Feiner, worked their way through the crowd to the speaker and requested him to cease his address but he continued speaking and the crowd closed in around the officers. After waiting about one whole minute the officer in charge again told Feiner to cease his speech but Feiner made no compliance. Finally, the officer demanded that Feiner get down, which he did, still speaking into the microphone and wisecracking as to the arrival of the law. Feiner was placed under arrest, charged with disorderly conduct in violation of Section 722, Subdivision 2 of the Penal Law. He was tried, convicted and sentenced as above stated and appeal taken first to the County Court of Onondaga County, later to the Court of Appeals of the State of New York and now a Writ of Certiorari to the Court of Appeals of the State of New York has been granted by the Supreme Court of the United States.

SUMMARY OF ARGUMENT.

1. That the petitioner, Irving Feiner, with intent to provoke, a breach of the peace and by words, acts and behavior by which a breach of the peace might be occasioned did commit the offense of Disorderly Conduct by the use of offensive, disorderly, abusive and insulting language conduct and behavior, that he did annoy, disturb, interfere with, obstruct and be offensive to others; that he did congregate with others on a public street and refused to abide by proper police direction; and that he did cause a crowd

to collect and by his speech and conduct so agitated that crowd as to render a breach of the peace imminent.

2. That his acts, utterances and behavior were evils of the very nature which the statute under which he was convicted was designed to prevent and that he did violate the statute.

3. That the statute under which he was convicted was not unconstitutional nor did its enforcement deprive petitioner of his liberty of freedom of assembly or freedom of speech.

4. That the statute is not invalid for the reason that it vests discretionary power in the public.

5. That the statute was violated even though no actual breach of the peace occurred.

6. That the testimony of the police officers clearly shows acts, language and disturbances tending to a breach of the peace in violation of the section under which he was charged and convicted.

7. That the testimony of the police officers is corroborated by the defense witnesses and shows that the police officers were confronted with a tense situation whereby a breach of the peace was actually threatened.

8. That the trial judge recognized every constitutional right of the petitioner and found him guilty not for their exercise of these rights but for their abuse.

9. That the duty rested on the judge of the Court of Special Sessions to determine the accurate version among conflicting stories of witnesses for the People and witness-

es for the defendant. That he reached his decision fairly and justly and this decision should not be disturbed.

10. That the Courts of the State of New York have long and consistently held that the trial judge is the best judge of all the facts, having before him all the witnesses and being in a position to observe the demeanor of every witness and evaluate their testimony and that his findings, unless clearly against the weight of evidence, will not be disturbed.

11. That it is immaterial whether any breach of the peace actually occurred or whether the persons affected by it were actually annoyed.

12. That the officers had a right to arrest the petitioner to protect persons from threatened wrong and to prevent disorder.

13. That there has been no violation of the constitutional rights of the defendant nor does his conviction violate either the First Amendment or the Fourteenth Amendment.

14. That our Courts, both State and Federal, while upholding the rights of freedom of speech, of assembly and of the press, have always recognized the necessity of proper curbs on these freedoms.

15. The principle involved in the cases cited by petitioner in support of this Writ, is in every case entirely different from that which lies in the within conviction and all cases were decided on constitutional principles and grounds not present here.

16. In the within case there was no previous restraint or prohibition.

17. The use of a loud speaker was not an issue at the trial or a factor in the trial judge finding the petitioner guilty.

Section of Penal law of the State of New York under which Petitioner was convicted and holding of New York State Courts in respect thereto.

The petitioner, Irving Feiner, was convicted under Section 722 of the Penal Law of the State of New York entitled Disorderly Conduct.

Section 722, Disorderly Conduct, in part is as follows:

"Any person who with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

1. Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior;
2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;
3. Congregates with others on a public street and refuses to move on when ordered by the police;
4. By his actions causes a crowd to collect, except when lawfully addressing such a crowd."

Section 722 of the Penal Law of the State of New York contains eight other subdivisions none of which are pertinent to the within petition.

The Court of Appeals of the State of New York has held that under Section 722 of the Penal Law it is not necessary to specify in the complaint the particular subdivision alleged to have been violated but that it is sufficient if the defendant be convicted of the violation of any subdivision of said Section. See People v. Hipple, 263 N. Y. 242; 188 N. E. 725.

This Section 722 it has been held is not unconstitutional in that it depriyes defendant of his liberty of assembly, freedom of speech, and of the press, and of his liberty to worship according to dictates of his conscience; People v. Hussock, 23 N. Y. S. 2nd 520. The Courts of this State have in the same decision held that Subdivision 3 of Section 722 is not invalid for the reason that it vests arbitrary and discretionary power in police, thereby leaving the question of violation to whim of police. The Courts of the State of New York, have repeatedly and in clear language stated that Breach of Peace is an offense well known to the common law. That it is a disturbance of public order by an act of violence *or by an act likely to produce violence* or which by causing consternation and alarm, disturbs the peace and quiet of the community. People v. Perry, 265 N. Y. 362; People v. Pierci, 269 N. Y. 315; People v. Huyck, 171 Misc. 467; People v. Montgomery, 17 N. Y. S. 2nd 71; People v. Kiernan, 26 N. Y. S. 2nd 291. Our courts have held that conduct which tends to breach the peace is, within certain limitations, a matter of discretion on part of the court. People v. Yergen, 164 Misc. 83.

The courts of this State have repeatedly held that in order to prove the offense of disorderly conduct tending to a breach of the peace *there need be no actual breach of*

the peace and proof of annoyance need not be established and that even if the defendant did not intend to provoke a breach of the peace, it is sufficient if his behavior was such that by it a breach of the peace might be occasioned. People v. Squires, 135 Misc. 214; People v. Yergen, 164 Misc. 82. That persons congregating on a public street may be dispersed, although their intent is orderly and inoffensive. People v. Hipple, 263 N. Y. 242; People v. Freidman, 14 N. Y. S. 2nd 389. That attending a public meeting, calling leader vituperative names, throwing the audience into confusion, constitutes disorderly conduct. People v. Rotundo, 160 Misc. 696.

A resume of the evidence offered by the People and submitted to the New York State Court of Appeals for their review clearly shows acts and language and possible disturbance tending to a breach of the peace.

In questioning officers and other witnesses, the following questions and answers clearly indicate a violation of the section under which he was charged for they spell out a situation whereby a breach of the peace might easily be occasioned.

Page 18 of the record:

"Q. Tell us exactly what you observed when you got there? A. When I arrived at the northwest corner, there was a crowd of approximately seventy-five people gathered—colored people and white—about forty-five feet back there was a car parked with a man standing on a large wooden box speaking through a hand microphone."

Page 19 of the record:

"Q. Tell us in substance what he said? A. He was speaking of John Rogge and the talk he was going to give that night. He called Mayor Costello a 'champagné sipping bum' and President Truman a 'bum' he referred to the American Legion as 'Nazi Gestapo Agents'. He also said the Fifteenth Ward was run by corrupt politicians and that horse rooms were operating.

Q. Did you observe the temperament of the crowd? A. Yes."

Page 20 of the record:

"A. I observed that there was angry mutterings throughout the crowd and the crowd hampered the use of the sidewalk.

Q. Where was the crowd with reference to the sidewalk? A. The crowd was on the sidewalk.

Q. Did you observe any pedestrians? A. Yes.

Q. What were they doing? A. Trying to use the sidewalk, but they had to go out in the road because of the crowd."

Page 21 of the record:

"Q. Was the walk obstructed? A. Yes.

Q. Where did the pedestrians go? A. Into the road.

Q. When these pedestrians went out in the road were they forced to use the highway used for vehicles? A. Yes.

Q. What did you do in reference to the crowd? A. I tried to get them up off the road.

Q. I ask you whether or not you mingled with the crowd? A. Yes.

Q. What did you observe and hear as you mingled with the crowd? A. I observed that there was pushing and shoving and I had trouble getting through some portion of the crowd—

Page 22 of the record:

I also heard angry mutterings especially when the defendant continued to speak after I requested him to stop.

Q. What, if anything, did the people say? A. When Mr. Feiner stated that the negro people did not have equal rights and should rise up and fight, one man came up to me and said, 'If you don't get that son of a bitch off I will go over and get him off myself'."

Page 23 of the record:

"By the Court:

Q. Did he speak loud or in a conversational tone? A. No, he was mad at the time."

Page 24 of the record:

"Q. I think your testimony, officer, was that the speaker was appealing to the colored people in particular? A. Yes, that's right."

Page 25 of the record:

"Q. Describe the voice the speaker used—was it low or high? A. It was loud—high pitched.

Q. Tell us again what his words were in reference to this arming? A. He said the negroes didn't have equal rights and they should rise up and fight for them.

Q. And immediately following what did you do? A. At that time when the gentleman came up and made the statement I testified to, I figured it had gone far enough so I went over to Mr. Feiner.

Q. When you got over to him what did you say or do?

Page 26 of the record:

"A. First, I asked him to get down off the box and he ignored me and kept right on talking to the crowd.

Q. How many times did you ask him to get down off the box? A. Once.

Q. How long did you wait after you asked him? A. About a minute.

Q. And he kept on talking to the crowd? A. Yes.

Q. And did he have a microphone he was talking through? A. Yes, in his left hand.

Q. After you requested him to get down off the box and he didn't, what did you do? A. I demanded that he get down.

Q. What did he then do? A. He did not get down.

Q. He still refused to get down? A. Yes.

Q. What was the condition of the crowd at that time? A. They were all coming closer and getting around my neck to see what was going to happen.

Q. When he did not get down, what did you do? A. I told him he was under arrest and he had to get down off the box.

Q. Tell us about those side-play remarks that were made? A. When he finally did get down off the box, he did not put the microphone away so that what was said by me and him could be heard by the crowd—so he told them the law had arrived and would take over.

Q. He still refused your request to cease speaking? A. Yes."

On cross examination by Mr. Greenberg, Page 32 of the record:

"By the Court:

Q. These people you say were walking down the roadway? A. Yes, they had to, they couldn't use the sidewalk."

Page 34 of the record. By Mr. Greenberg:

"Q. Did you include these four people as part of the ten that was forced into the road? A. Yes, they told me they were—they said they had to use the road.

Q. Because of the crowd on the west side of McBride Street? A. Yes."

Page 35 of the record:

"Q. Did any of these ten people come up to you and complain about the situation? A. Some made remarks about the police force not being able to handle the crowd."

Page 37 of the record:

"Q. During the time you were on the west side of the street, did you have any difficulty walking back and forth? A. Yes, in a portion of the area."

Page 38 of the record:

"Q. From your observation, while mingling with the crowd, are you prepared to state that there wasn't room enough for people to walk back and forth? A. Yes—if they wanted to push around there was room."

Page 40 of the record:

"Q. What did the defendant say with reference to Mayor Costello? A. He said he was a 'champagne sipping bum' and that he would not speak for the negro people and he wouldn't have him speak for them."

Page 41 of the record:

"Q. Did anyone do anything beside mutter? A. Some of the crowd were pushing and shoving at that stage but not to excess.

Q. You did not regard it as a disturbance? A. Not at that time but we stepped in to prevent it from becoming a fight. After all, there were angry muttering and pushing."

Page 42 of the record:

"Q. You said that the defendant said to rise up in arms and fight? A. Yes, he said fight for your rights.

Q. Did he at any time say rise up and arm? A. He said, 'in arms'.

Q. But you never got the impression that he was sending anyone home for weapons? A. I got an impression and I took action on it, that is all that was necessary.

Q. What impression did you get? A. That he was trying to arouse the negro people against the whites.

Q. And you went over for the purpose of arresting him? A. No, I did not.

Q. What was your purpose? A. To get him to break the congregation up, that is the reason.

Q. To stop the meeting?"

Page 43 of the record:

"A. Yes.

Q. What was the first thing you said to him? A. I said, 'Will you get down off the box', and he just looked and kept right on talking to the crowd.

Q. Did you then make another statement to him? A. Yes, after I waited a little while.

Q. What did you next say to the defendant? A. I told him to get off the box, and he still did not get down—then I demanded that he get down and he said, 'The law has arrived'; he said that through the microphone; 'The law has arrived and I suppose they will take over now'.

Q. You say you asked him three times to get down off the box? A. I asked him to get down once, I told him to get down the second time and demanded the third time."

Page 44 of the record:

By Mr. Kelly redirect:

"Q. And you had to repeat your request several times and finally take this man in custody in order to get him to desist? A. Yes."

On examination of Officer Cook. Page 47 of the record:

"Q. Tell us what you heard—what was said by this speaker? A. He was making remarks about certain people—certain public officials. He called Mayor Costello 'a champagne sipping bum'. He called President Truman a bum and he told the negroes to rise up and fight for their rights."

Page 48 of the record:

"Q. Did you observe whether there were people passing north or south on McBride Street using

that thoroughfare or the sidewalk? A. They could not use the sidewalk.

Q. What did you observe in reference to the pedestrians going north and south at that point? A. They had to walk around into the road—they could not pass on the sidewalk.

Q. When they went out into the road did that bring them into the travel portion of the highway used for vehicular traffic? A. Yes."

Page 49 of the record:

"Q. Do you recall anything else about the traffic that night? A. Well as I drove on South McBride Street and went past the crowd, I had to slow down pretty near to a stop at that point.

Q. What did you observe as to the attitude of the crowd? A. They were kind of restless.

Q. Tell us just what the crowd was doing?"

Page 50 of the record:

"A. Milling around back and forth—and a couple of times I heard someone say they did not see why they had to put up with that kind of stuff in the neighborhood.

Q. What happened to the pedestrians on the street? A. They had to go around in the road—they could not get by on the sidewalk.

Q. What did he say? A. 'If you don't take that son of a bitch off there I will take him off myself'.

Q. What was the general attitude of the crowd? A. They were getting to the point where they would be unruly."

Page 51 of the record:

"Q. What did Feiner do when Flynn asked him

to get down off the box? A. He kept right on talking."

Page 52 of the record:

"By the Court:

Q. What else was said, Officer, that you can recall? A. I know he said the negroes should rise up in arms and fight for their rights.

By Mr. Kelly:

Q. Did you notice the attitude of the crowd after that statement? A. Yes, they seemed to mill around a little then.

Q. Were they as well behaved after that remark as they were before? A. It stirred up a little excitement."

On cross examination by Mr. Greenberg. Page 58 of the record:

"Q. Did you have any trouble getting through the crowd yourself? A. I did have a little difficulty, yes."

Page 59 of the record:

"Q. So that no one complained about having to walk in the road, isn't that true? A. Well, there was a couple of people in the crowd that said, 'How long have we got to put up with this'."

Page 60 of the record:

"Q. You heard some say, 'How long do we have to put up with this?' How many said that? A. Probably three that I heard.

Q. Did they say that to you? A. Two of them said it to me."

Page 62 of the record:

"Q. We heard you say that before—what else did he say in reference to Mayor Costello? A. I think he said the Mayor was out of town at the time attending a party or some celebration and he made a statement like, 'Do you think that champagne sipping bum would help you,' something like that.

Q. What else did he say? A. He made reference to the negroes—that they didn't have equal rights. He said the only way they would get their rights would be to rise up in arms and fight."

Page 64 of the record:

"By the Court:

Q. He asked him once? A. Yes. He asked him to get down the first time; he told him to get down the second, and demanded the third.

Q. Did Feiner at any time say he would not get off the box? A. Well, he kept right on talking.

Q. How long a time elapsed from the time Flynn first asked Feiner to get off the box until he was placed under arrest? A. Maybe four or five minutes."

In view of the language used, the aspersions cast and the very apparent unrest in the crowd and despite the right of free speech and free assembly which was not questioned by the officers, still the effect on the crowd whether intentional or otherwise on the part of the speaker clearly spelled out a picture where trouble was imminent and disorder could most easily follow. The officers were not precipitate in their action and the whole scene before them presented a situation where action to prevent disorder was thoroughly warranted and justifiable. The picture before

them cannot be duplicated by any record and who can say that as police officers, guardians of the public peace they should have done less to preserve public order. It was a good piece of excellent police work on the part of two officers who acted very conservatively to avoid a real threatened breach of the peace.

The story as related by the police is to a most marked degree corroborated by the defense witnesses and shows that the police officers were confronted with a tense situation where a breach of the peace was actually threatened. This same evidence was before the New York State Court of Appeals.

The witness Carter on direct examination. Page 75 of the record:

"Q. What did you observe as the police officers went from their cars across the street to the speaker's stand? A. *When they got to the speaker's stand it took me some time to work my way up because the people started to collect around it when they saw the officers there.*" (Italics ours.)

Page 77 of the record:

"Q. Did he make any reference to Mayor Costello in regard to his sipping champagne? A. He said that Mayor Costello was too busy sipping champagne in New Orleans to be concerned with the housing in Syracuse."

Page 81 of the record:

"Q. The police were not bothering you? A. I expected it.

Q. You expected the police to interfere? A. Yes.

Q. And why did you expect that? A. Because

it's been the expected thing at any function of the Young Progressives of America."

Page 84 of the record:

"Redirect by Mr. Greenberg:

Q. Did you observe any mutterings on the part of the crowd? A. I observed only one man muttering.

Q. Did you see that man go to the police? A. Yes."

Page 85 of the record:

"Q. What happened when the police arrived on that side of the street where the speaker was? A. Well,—first *I worked my way through* where I could see what was going on better.

Q. Why did you have to work your way through? A. Because I anticipated this.

Q. I don't care what you anticipated. A. Well—as soon as the officers arrived over there *the people began to crowd around the officers and the defendant*, the whole crowd immediately surrounded them." (Italics ours.)

Page 86 of the record:

"Q. Go through or by pass or whatever you want to call it. A. Well, *the people were about four deep in a circle.*" (Italics ours.)

Page 97 of the record:

"Sammy Jamison direct:

Q. How long did you remain at the corner? A. About five minutes."

Page 98 of the record:

"Q. You don't know how many people were at the meeting before you got there? A. No.

Q. Nor how many people were there after you left? A. No.

Q. And you don't know what was said by the defendant before you got there? A. No.

Q. Nor what was said after you left? A. No."

Page 113 of the record:

"Testimony of Larry Little. By the Court:

Q. What did you hear him say? A. I heard him say a lot of things. He spoke of the violation of civil rights, he spoke of the Ingraham case and the case of the veterans who fought in the South—he spoke of the Trenton Six and he spoke of this case in question of the meeting in Madison Street School. He gave details on these things."

Page 114 of the record:

"Q. What did he say about Mayor Costello? A. He mentioned about his being down in Florida, I believe, drinking champagne, he said he did not have time to look after the housing in Syracuse but he did have time to drink champagne."

Page 115 of the record:

"Q. Were you present at the meeting at the time the police officer came across the street? A. No."

Page 116 of the record:

"On cross examination:

Q. You don't know what the officer did from the time you left the meeting until you returned? A. No."

The police version of a milling crowd and the difficulty with which they moved through this crowd is amply corroborated and the effect of the speaker's words on the crowd

is likewise corroborated by the defense witnesses who were present and observing and they admit that they expected police interference and clearly shows that the police interference was justifiable in the interest of preserving public order for under all circumstances a breach of the peace might well have been occasioned.

The police were impartial observers, they had a picture of the whole situation, they were in a position to sense danger, they could and did measure the temparment of the crowd and acted calmly to avert an open breach of the peace.

The duty rested on the Judge of the Court of Special Sessions to determine the accurate version among conflicting stories of witnesses for people and for defendant and his decision should not be disturbed. The following was before the New York State Court of Appeals for their consideration.

Whether or not there was a breach of the peace or a threatened breach of the peace within the Statute was a question of fact for the Magistrate who heard the case to decide. In fact all that is involved here is a question of fact and whether the opinion of the Magistrate was a sound one.

The Magistrate before whom this case was tried is the best judge of the credibility of the testimony brought out. He was in a position to observe their bias, prejudice, motive or interest, to study the materiality of their testimony and to form a decision from all the facts before him more accurately than can be placed before any Appellate Court on a written record. When the testimony of witnesses is

conflicting the Madgistrate before whom the trial is held is the best judge of the ultimate truth. He has the picture as a whole to a degree that cannot be duplicated by a record. Can what he observed be questioned as to facts on which his decision was based? Judge Bamerick recognized every right of the defendant as to freedom of speech, freedom of assembly, freedom to express views distasteful to others, the right to use the streets as a public forum and the right to use a loud speaker and in his decision did not consider them as violations. He confined himself only to the acts under all circumstances tending to a breach of the peace.

The picture before him is best reproduced in his own words, when, at the close of the People's case, Judge Bamerick said, on page 71 of the record:

> "The basis of the action here, is not whether or not Disorderly Conduct actually occurred, but whether or not the circumstances furnished the occasion for a possible act or acts that would come within the classification of Disorderly Conduct. The question is whether the combination of circumstances there, the fact of the meeting; the talk being delivered over the loud speaking apparatus, which in and of itself is perfectly proper; the attitude of the crowd as testified to by Officer Flynn; the angry muttering; the expression of this one man who by that statement, indicated his attitude; and the remarks that the officers testified to that were overheard in this crowd, the question is, whether or not with this combination of circumstances there was a possible occasion for the Disorderly Conduct as the officers appraised the situation there. I think that

is the point here. If the combination of these things created a situation wherein the Officers concluded that there was danger that a situation might arise that could involve disorderly conduct, then I would think that the officers would be not only acting within the realm of their duty, but I think it would be good judgment on the part of the officers to step in and try to avoid and head off any such development as that.

I think that the attitude of the man who made the remark indicating how he felt climaxes these other things; this appeal that was being made by the defendant at that time to these people to rise up with arms and fight."

The Court further said:

"I think the implication and the fair inference to be drawn from that would be such as to cause the officers to feel that a possible occasion of disorderly act was present."

Also at the close of the defendant's case Judge Bamerick expressed himself as follows, on page 131 of the record:

"You take the position that the officer when he crossed the street on his way to where the defendant was speaking; that the officer, on his way across the street did not have in his mind to arrest the defendant that, that is a conclusion here. What I have in mind is this—it's possible, is it not, that a police officer may witness certain acts and hear certain talk that would or could be a basis for a charge of disorderly conduct? He might be a very patient type of officer who, notwithstanding all that

had transpired before, decided, after crossing the street, and by the use of his good judgment that the arrest was justifiable.

I don't believe the fact that the officer testified that he did not have in mind to do anything about this meeting, so far as making an arrest was concerned, when he was crossing the street or when he first spoke to the defendant is conclusive. That is my position.

Whether or not the arrest was proper depends not on what the officer had in his mind, but it depends on what action took place there and upon the evidence that has been presented here as to what actually took place."

On page 133 of the record the Court further said:

"Mr. Greenberg, I accept those principles—I have read all those cases you cited, so now we get right back to the motion to dismiss which you made a couple of days ago, where in those cases I told you that the points that are raised are not appropriate points in this procedure. Let me repeat to you again, it isn't the fact that a sound truck was used—we don't question that; it isn't the fact that the crowd, so far as numbers are concerned gathered at this point. That is something the law holds is perfectly proper."

On page 133 of the record the Court further said:

"The question here, is what was said and what was done? And it doesn't make any difference whatever was said, was said with a loud speaker or not. There are acts and conduct an individual

can engage in when you don't even have to have a crowd gathered around which would justify a charge of disorderly conduct. The question is, what did this defendant say and do at that particular time and the Court must determine whether those facts, concerning what the defendant did or said, are sufficient to support the charge."

And on page 136 through 141 of the record the Court further said:

"Mr. Feiner, you have been charged with the offense of Disorderly Conduct, arising out of the meeting on the corner of South McBride and Harrison Streets on the night of March 8th, 1949, which was addressed by you over a loud speaking system.

Now, you have had a fair trial; you have been ably defended by good counsel, that is a right that is afforded everyone in this country, regardless of his position or his race or situation in life. That is a priceless heritage; that is something that is foreign to some of these ideologies in some of the places in this world and that some folks in this country seem to like and seem to endorse.

Now, awhile ago, I think on the 26th of March, a very estimable citizen of this town; a man who commands the respect of every individual who has ever had any contact with him or who knows anything about him delivered a talk here in town at a certain place, and I would like to summarize briefly what this outstanding citizen of this town had to say. He spoke on the freedom of speech; something that is prized very highly; something that is talked about very generally nowadays. That, too, is one

of the priceless heritages we have in this country, and which we would like to preserve. It is something our forefathers fought and bled for, and they set up this system of equal rights for everyone, including you and including me; and on that subject, this man that I have spoken to you about, had this to say:

'The importance of Freedom of Speech, for which our fathers fought and died for is a very, very important right. Freedom of Speech,' he said, 'is a right which must not be abused in public any more than in private. Our citizens should be protected and should be permitted to exercise their civil liberties, and Freedom of Speech is a very precious liberty. However, when these liberties are abused they endanger our national security. Then this Freedom must be controlled.'

Continuing, he said something about Communism, the mention of which has been avoided here, so I will omit that.

He maintains that people who advocate change by violence, and who divide a nation to conquer, and pit man against man, and class against class and race against race and color against color, and religion gainst religion, would be denied the right of freedom of speech.

Now, the man who delivered that talk; that outstanding citizen is Rabbi Benjamin Friedman, and he delivered that talk in the Temple of the Society of Concord in this city, of which he is the head.

I think that is a good, sound, sensible philosophy. I think our citizens should be permitted to exercise those liberties that Rabbi Friedman spoke about;

the freedom of speech and the numerous other freedoms you have heard a good deal about, subject, however, to some regard for the rights of others; subject to other people's convenience; subject to other people's wishes.

Even though what I am saying may sort of weary you, as the last gesture you made would seem to indicate, it may be that what I say has no meaning whatever for you. But these thoughts and these ideas are so important to the welfare of the country, that even though what I say wearies you, I am going to keep right on saying it.

I say that this freedom must be subject to the regard for the rights of others and to the reasonable exercise of the police powers which is recognized in our system of government as an important adjunct to the regulation of our affairs; and then again, to the use of whatever reasonable restraint the law imposes.

In other words, we can't have absolute rights; we can't have the absolute right to go out and use the streets or to enjoy any of these freedoms that so many people talk about today. No, it's not an absolute right. Every right and law must be exercised with some regard to the rights of others.

Now, on the 8th day of March of this year, you were addressing a number of people on the corner of South McBride and Harrison Street, on the evening of that day. As I gather it, you were talking about a meeting that was to be held at some other place, and which was to be addressed by a man named John Rogge.

Mario Rossi, said in his column in the Post-Standard, that this man, John Rogge, was connected with a very important department of the National Government at Washington. He was in the inner circle, and while remaining there, everything was all right. He was agreeable to the program; he found nothing wrong with the way the affairs of this government were conducted. But the minute he got out of the government, and he was outside of the circle, then it was something different. As long as Rogge could not be in the circle, then, according to Rossi, there was to be no circle.

So, you were talking over the loud speaker on this evening in question when a call, according to the evidence, came to Police Headquarters, as a result of which two police officers were dispatched to the point where you were speaking. And after arriving on the scene there, the officers made certain observations, and according to their testimony, they spent some twenty minutes or twenty-five minutes more or less (that is not so important) listening and observing.

Now, there is no question about the right of any citizen, including yourself, to use a sound truck for the purpose of delivering an address, and I have no dispute or differences with any of the decisions of the United States Supreme Court or any court on that subject. You had a perfect right to appear there and to use that implement, the loud speaker. You had a right to have it in the street. There is no question about that. But bearing in mind what I said a few minutes ago, quoting Rabbi Friedman;

that right has to be conducted within certain restraints; and subject to reasonable police regulations and the exercise of police power to see that no disorderly conduct arises, and that the rights of others are not violated.

The officers say, and they so testified, that they stood there during this period of time on the opposite side of the street, and they heard you call Mayor Costello and Mayor O'Dwyer and President Truman the names you heard testified to.

Now, it is conceded by your Counsel, that that might be considered bad taste; that might be disrespectful, even though, so far as the exercise of that particular right is concerned, to call people names, we will assume you had a right to do it.

I don't think that was the sensible or the proper or the decent way in which a good citizen should operate. Of course that is disputed by you, but I am inclined to go along with the officers, because what they say is in so many respects so close to what your witnesses have testified to that I am impressed by that fact.

The manner in which you spoke of the American Legion, that too, was something so unnecessary, and so uncalled for, and so disrespectful toward a great organization that has a great record, and has great men in its ranks, and which urges and fights that we maintain this system of government that some other people are so ready to destroy.

I don't think, even though you were within your strict legal right, in addressing the American Legion the way you did, I don't think that is an attribute of good citizenship.

Now, the officers say there were other things; they say there was a crowd of seventy-five or eighty people gathered there; that the space between the curb and the wall of the building was so taken up with the number of people that it was next to impossible to find free passage; that it was necessary for people attempting to pass up or down on that side of the street to go out into the roadway where vehicular traffic made it appear to the officers that some situation might result from that, whether dangerous or what, they noted that. They also came across the street, as they testified, and mingled with the crowd. They say there was pushing and muttering, indicating a state of unrest. They heard remarks from three different men in that group, indicating a frame of mind which could be disturbing. They were asked as to how long you were going to be permitted to talk. One man came across the street and said to Officer Flynn, 'if you don't get that so-and-so off there, I will go over and get him down myself.' The officers acted on these appeals at the last stage, after hearing you stress the inequalities and the unfair things you claim you were disturbed about. They then heard you appeal to these people to stand up, and in arms or with arms, and to fight.

Now, under those circumstances I think the officers were fully justified in feeling that a situation was developing which could very very easily result in a serious disorder. I think the officers were very patient up to that time. I think that on the basis of the evidence here that you deliberately agitated

and that in every way that you could, you goaded these officers to action. They were right there on the opposite side of the street; you knew they were there. Your own witnesses who were there at the corner testified that the officers were there on the opposite side of the street. And you kept right on talking about racial inequalities, with this muttering; this angry muttering, which, according to the officers, made them feel that a situation was developing and which they finally decided called for some action.

Now, they came across the street and they asked you to get down off the box, but before that—your own witnesses have testified to that same story with a slight variance; I am referring now to that part of the testimony of the police officers regarding the statement attributed to you, to rise up and fight. Your own witnesses say, yes, you did appeal to these people to rise up and fight, but so far as the 'arming' is concerned, again according to your witnesses, it was simply a case of 'arm in arm' and walking away in that fashion. According to your witnesses there were only twenty-five persons there, and one of your witnesses says there were ten of your own people there. You certainly were not appealing to them over the loud speaker. I am impressed by what the officers say on that score. I think they had every reason in the world to believe, on the basis of the facts that they have testified to, that something serious was about to happen. And then the officer asked you to get down off the box, and he asked you again, and then one of the officers

says he took you by the arm or reached for you. Three times you had to be requested to get off the box. I think that all those facts that have been testified to here are sufficient to sustain the charge of Disorderly Conduct.

Now, let me tell you one other thing, my boy, and this may be a surprise to you. I don't bear the slightest ill-will toward you. I haven't the slightest feeling; I haven't any feeling toward any man or woman in the world. You are a human being endowed with the dignity and rights of any other human being. I have just as much respect for you as for anyone else, but I haven't much respect for the philosophy you endorce or for the remarks you made on that night in question. I think that talk of yours was designed to do the very things that Rabbi Friedman has spoken about; to line up class against class and race against race, and that philosophy of yours will never prevail in this country. I am sorry to see you here—I regret to take this position. I find on the facts that you are guilty as charged in the Information and Warrant."

The People of the State of New York, Respondent, vs. Helen Tepperman, Appellant, Court of Special Sessions, City of New York, Appellate Part, First Judicial Department, June 4, 1934, 151 Misc. page 810.

"The duty to determine the accurate version among conflicting stories of the deponent officer,

witnesses and defendant, rested on the magistrate and his findings will not be disturbed by an appellate court."

Kernochan, J., on page 811 said:

"This is an appeal from a conviction charging the defendant with disorderly conduct tending to a breach of the peace in that on the 19th day of April, 1933, the appellant was in front of 245 Revington Street, using threatening, abusive and insulting behavior with intent to provoke a breach of the peace and whereby a breach of the peace might be occasioned. * * * We still have left that *she used threatening, abusive and insulting behavior, whereby a breach of the peace might be occasioned;* and that she scratched and punched the deponent and caused a crowd to collect. * * * *The testimony of the officer and of the appellant and her witnesses was conflicting.* This conflict the magistrate decided in favor of the officer and against the appellant. *It was the duty of the magistrate to decide this question of fact and his findings will not be disturbed by the appellate court,* * * * " (Italics ours.)

Kernochan, J., on page 812, further said:

"The next important question to decide is did the officer arrest her for picketing or even attempt to do so. He certainly did not act on his own initiative, for when the proprietor of the bakery told him the appellant was not a baker, the officer said, 'I will go and ask her. If you will be the complainant I will take her to the station house'. He then spoke to the appellant, and said: 'You will have to come

over to the station house with me.' At this time the testimony shows that the appellant did not resist but simply said: 'I won't talk over there, you will have to call the wagon.' He then said, 'Will you please go inside until I can call the wagon.' Immediately after this the appellant scratched the officer in the face and he says, 'smacked me in the eye.' This is the disorderly conduct charge complained of and it appears that it was this that caused the arrest by the officer. The many cases quoted by the appellant's attorney are all based on the assumption that she was resisting an unlawful arrest. In my opinion the testimony of the officer does not support this and a clear case of disorderly conduct has been proved by the evidence. Judgment affirmed."

This case is strikingly similar to the case on appeal in that a request on the part of the police officer, disregarded by the defendant, finally provoked the arrest.

The People of the State of New York, Complainant, vs. Anna Yergan, Defendant, City Magistrate's Court of New York, Fifth District, August 4, 1937, 164 Misc. p. 83.

This was a motion in arrest of judgment after the defendant had been found guilty of Disorderly Conduct in violation of Subdivision 2 of Section 722 of the Penal Law. The motion was denied.

Bromberger, City Magistrate, in his opinion, says on page 85:

"'Mr. Justice Bijur (People v. Lipschitz, 120 Misc. 633), quoting Judge Holmes, succinctly thus establishes a rule governing disorderly conduct: 'In offenses of this kind the standard is that of what Judge Holmes in his 'Common Law' calls the 'average member of the community' observing the 'current morality.'

Conduct which tends to a breach of the peace is, within certain limitations, a matter of discretion on the part of the magistrate. And this must necessarily be so if law, order and ordinary decency in so large a metropolis as the City of New York are to be maintained. (People v. Lipschitz, 120 Misc. 633; Matter of Twelve Commitments, People v. Nixon, 248 N. Y. 182).

It is immaterial whether any breach of the peace actually occurred or whether the persons affected by the defendant's conduct were actually annoyed. (People v. Lipschitz, supra; People v. Squires, 135 Misc. 214; People v. Sinclair, 86 id. 426; Cobb on Inferior Criminal Courts Act p. 136; and cases there cited.)

The words 'tending to a breach of the peace' or 'by which a breach of the peace may be occasioned' mean such behavior on the part of one which might be resented either forcibly or by loud and boisterous language, regardless of what action, in fact, is taken by those who are subject to it. (People v. Cohen, 136 N. Y. Supp. 163)"

Bromberger, J., on p. 86, further said:

"In determining whether or not the conduct is of a disorderly character within the purview of the statute, the court may take into consideration all the surrounding circumstances; the place or places where the offense occurred; the time of the day or night; the manner in which it occurred; the lack of previous acquaintance of the parties with each other; the repetitious and systematic conduct of the defendant, and all other elements presented by the testimony.

It may also be observed that while the court in determining the guilt of this defendant before it did not take into consideration the fact that she failed to introduce any testimony in her own behalf or failed to take the stand, it nevertheless directs attention to the principle, well established in this State, that while no such inference of guilt may be drawn from the failure of the defendant to take the stand, the court is warranted in taking the facts and circumstances which, if innocent, she might have controverted and explained, most strongly against her. (People v. Smith, 114 App. Div. 513; appeal dismissed, 187 N. Y. 557; People v. Trombino, 238 App. Div. 61; affd., 262 N. Y. 689.)"

The People of the State of New York, Respondent, v. Frank Squires, Appellant, Court of Special Sessions, City of New York, Appellate Part, First Judicial Department, New York County, November 15th, 1929, Misc. 135, p. 214.

In this case the defendant had been convicted in the Fourth District Magistrate's Court, Borough of Manhattan, for disorderly conduct tending to a breach of the peace.

Herbert, J., on p. 215 said:

"The sole question presented on this appeal is whether the opinion of the magistrate was a 'sound' one, (Cobb, supra.) 'The discretion confided to a magistrate cannot be without limits. The act complained of must at least be one which reasonably does tend to a breach of the peace.' (People v. Nixon, 248 N. Y. 182.)

That the learned magistrate believed that the acts of the defendant violated either one of the sections is apparent from the conviction of the defendant, and we think that he was justified in coming to that conclusion. The Legislature defined as disorderly conduct any act whereby a breach of the peace may be occasioned which annoys, disturbs, interferes with, obstructs or may be offensive to others. (Penal Law, Sec. 722, subd. 2.)

In order to prove the crime of disorderly conduct tending to a breach of the peace there need be no

actual breach of the peace and proof of annoyance need not be established. (Cobb, supra, p. 136, and cases cited.) 'But even if the defendant did not intend to provoke a breach of the peace, it is sufficient, as we have seen, to bring him within the statute if his behavior was such that by it a breach of the peace might be occasioned.' (People v. Sinclair, 86 Misc. 426, at p. 436.)" (Italics ours.)

The People of the State of New York, Respondent, vs. Salvatore Arcidiaco, and another, Appellants, Court of Special Sessions, City of New York, Appellate Part, First Department, 156 Misc. p. 461.

Salomon, J., on page 461, said:

"The defendants are charged with disorderly conduct under subdivision 11 of section 722 of the Penal Law in that the defendants did unlawfully and with intent to provoke a breach of the peace and whereby a breach of the peace may be occasioned, did on or about June fifth and thereafter and on various occasions until June twenty-eighth consort with each other for an unlawful purpose. The defendants are individuals who bear evil reputations.

We are satisfied from a reading of the testimony in this case that the magistrate, before whom the case was tried was justified and warranted in finding from the evidence, adduced before him that the defendants were criminal and evil reputation and consorted with each other for an unlawful purpose.

We will not overrule or disturb the findings of the magistrate in this case.

The magistrate had before him all the witnesses and of course was in a position to observe their demeanor and of each and every witness." (Italics ours.)

In this case the Appellate Court recognized that the evaluation of the testimony could best be made by the trial magistrate who was in a position to have the most comprehensive view of the whole picture before the magistrate.

The People of the State of New York, Respondent, vs. Max Berkowitz and others, Appellants, Court of Special Sessions, City of New York, Appellate Part, First Judicial Department, July 19, 1928, 132 Misc. p. 744.

This was an appeal from a judgment convicting the defendants of disorderly conduct tending to a breach of the peace—in this case the conviction was reversed, but in a dissenting opinion, Herbert J., (dissenting) on page 745 says:

"It was shown by the People and admitted by the defendants that at the hour of nine o'clock A. M. they both walked back and forth on the sidewalk in front of the Mutual Life Insurance Company located at No. 32 Nassau Street, in the Borough of Manhattan, City of New York, bearing the signs set forth in the complaint. *They accosted nobody, they were not directed to move on, and the evidence*

of having collected a crowd; even if that question be material, is not satisfactory. The sole question for our determination is: Was the conduct as above described as in the opinion of the magistrate tended to a breach of the peace. (People v. Nixon, 248 N. Y. 182.) *It is evident that the magistrate believed that it was, because he found them guilty, and it is for us to determine on this appeal whether the discretion of the magistrate in arriving at that conclusion, was properly exercised. I believe that it was.* (Italics ours.)

The acts of the defendants to constitute a violation of the statute need not go so far as to be in themselves a breach of the peace. If the acts complained of *'be at least one which reasonably tends to a breach of the peace'* (People v. Nixon, supra), *I think the statute is violated.* (Italics ours.)

The acts of the defendants in walking up and down carrying these signs at the time and place and under the circumstances mentioned did, in my opinion, tend to a breach of the peace, and a breach of the peace on this occasion might very easily have happened if the janitor of the building had not used the good judgment which he displayed in handling this situation.

The defendants' union had no grievance against the Mutual Life Insurance Company but they evidently relied upon the presence of the defendants at the time and place mentioned and upon the words on the signs reading 'Mutual Life Insurance Company' to create such a condition of affairs in front of that building as to force the Beaver Window

Cleaning Company to make terms with the union. *This conduct might easily have led to a breach of the peace and I think the magistrate had sufficient reason to decide that it would* (Italics ours.)

I vote for affirmance of the judgment of conviction."

People v. Lumbo, Westchester County Court, 8 N. Y. S. 2nd. p. 744.

This was an appeal from a conviction for disorderly conduct in violation of Sub. 11 of Section 722 of the Penal Law.

Coyne, J.

"The magistrate has found that the defendant was engaged in the illegal occupation of collecting policy slips and other memoranda used in the illegal game of policy.

The records contains ample evidence to establish the commission of the acts charged in the information and also to sustain a finding that defendant had been continuously engaged in said illegal acts over such a period of time and in such a manner as to constitute an illegal occupation. * * * *Where such findings are not clearly against the weight of the evidence they will not be disturbed on appeal.* * * * *Prosecutions under Section 722 are for criminal offenses tending toward a breach of the peace. People on Complaint of Mulhern v. Kauffman, 165 Misc. 670, 1 N. Y. S. 2nd, 362, and as to the determination and disposition of which wide discretion* is vested in the magistrate." (Italics ours.)

It is immaterial whether any breach of the peace actually occurred or whether the persons affected by the defendant's conduct were actually annoyed.

In the within case no actual breach of the peace did occur, but the situation confronting the officers was so charged with the probability of an outbreak that they made the arrest to preserve public order and to prevent an actual breach of the peace.

People v. Yergan, 164 Misc. 83, holds that it is immaterial whether any breach of the peace actually occurred or whether the persons affected by the defendants' conduct were actually annoyed.

People v. Lipschitz, 120 Misc. 633
Supreme Court, New York City.

Bijur, J., on page 635, said:

"and the essence of the offense of disorderly conduct as referred to in these statutes was *that it tended to a breach of the peace* * * * since a breach of the peace has not by the very hypothesis occurred the magistrate *could not arrive at the conclusion that the disorderly conduct complained of tends to a breach of the peace without exercising his judgment or opinion thereon and to that effect.* * * * We must not lose sight of the fact that the very offense 'breach of the peace' is one that has not been and from the very nature of the case cannot be described or confined within certain arbitrary limits and this is at least equally true of acts which tend to produce such breach." (Italics ours.)

See also: People v. Squires, 135 Misc. 214 Supra. People v. Berkwitz, 132 Misc. 744, Supra.

People (Grahl) v. Vogt, 178 Misc. 446. Magitstrates' Court, New York, Borough of Manhattan.

This case holds the defendant is guilty of disorderly conduct in violation of Subdivision 2 of Section 722 of the Penal Law where, in a public bar and grill, he addressed to the complainant, a uniformed sailor in the United States Navy, in the presence and hearing of other persons, words which would incite the complainant and others to disloyalty and public disorder. Words which ordinarily and in many places would be within the freedom of speech protected by the constitution may become a subject of prohibition when of such a nature and uttered under such circumstances as to create dangers which pertinent legislation had a right to prevent.

Rothenberg, J., page 447, said:

"A person is guilty of disorderly conduct who 'acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others.' (Penal Law, 722, subd. 2). It has, however, been held that it is not essential that there be an actual breach of the peace. The test in each case is whether the defendant's conduct under the circumstances led to, or was likely to lead to disorder or public disturbance. People v. Nesin, 179 App. Div. 869; People v. Bevins, 74 Misc. 377; affd. 149 App.

Div. 935; People v. Bellows, 281 N. Y. 67; People v. Sadowsky, 149 Misc. 583.)

The question to be determined by this court is as to whether the language used by the defendant *either created or tended to create a breach of the peace.* Freedom of speech and of the press are fundamental rights, which are safeguarded by the Federal Constitution. These rights, however, may be abused by using speech or the press so as to incite to violence or crime. The people through their authorized legislative bodies may protect themselves against the abuse of freedom of speech or of the press. *The right of free speech is not absolute. It is relative and limited by consideration of public welfare.*" (Italics ours.)

And at page 448:

"What was the tendency of the language uttered by the defendant in the case at bar? It expressed to the complainant the defendant's opposition to the war and its purposes. It incited complainant, a sailor in the United States Naval forces to insubordination and disloyalty. Defendant's words offended the complainant as well as others within hearing. The objectionable utterances were made in a public place, a bar and grill, a classic arena for brawls. *Were the complainant and the witness Ellis less restrained in their behavior upon hearing defendant's language, violence might easily have ensued under the circumstances.*

Courts may not dictate the opinions or sentiments which citizens privately may entertain, *but they may place an injunction upon the public expression*

of seditious statements in a time of war and of national danger which incite or tend to incite disloyalty and public disorder." (Italics ours.)

The reasoning in this case may well apply to the instant case, the only difference being that the possible scope of disorder, the effect of Feiner's speech on the crowd he addressed in the manner he did address them could easily have been the same as the possible effect of the defendant Vogt on the barroom crowd where he made his utterances.

People vs. Hipple, 263 N. Y. 242.

Pound, Ch. J., on page 243 said:

"A group of persons congregating on a public street may be dispursed although their intent is orderly and inoffensive. Even then it may be said that 'a breach of the peace may be occasioned.'"

People vs. Nesin, 179 A. D. 869.

This is an appeal from a judgment of the Court of Special Sessions of the City of New York.

"PER CURIAM:

Appellant opened an outdoor meeting at a crowded street corner, on May twenty-third last, by an appeal against the war, declaring to those gathered: 'You men that are listening to me, you must not obey the laws of Congress in this matter of conscription, you must not take up arms against Germany, as Germany is a friendly nation to us.' These and other words incited to resist the draft. Such

utterances upon a public street, if permitted, could hardly fail to offend law-abiding citizens, and so become dangerous to the public peace.

Appellant was rightly convicted under the Penal Law of this State, which, by Section 43, makes a misdemeanor an act 'which seriously disturbs or endangers the public peace.' That during his address of eight or ten minutes no actual disturbance broke out, did not excuse appellant, since such urging the crowd to defy the law tended clearly to provoke an outbreak. Appellant's acts may have also offended against the Federal statutes. That jurisdiction, however, did not take away the power of the courts of this State to punish such an offense against the public peace. (People v. Welch, 141 N. Y. 266.)" Jenks, P. J., Thomas, Stapleton, Mills and Putnam, JJ. concurred.

People vs. Ward, 159 Misc. 328.

"PER CURIAM: Page 330.

Police officers are guardians of the public order. Their duty is not merely to arrest offenders but to protect persons from threatened wrong and to prevent disorder. In the performance of their duties they may give reasonable directions.

Appellants further contend that defendants were merely attempting in good faith to test a police regulation. However that may be, this motive is not controlling if in fact their acts constitute disorderly conduct. In this connection the language of the court in People v. Galpern, 259 N. Y. 279, at p.

282 is pertinent: 'Failure, even though conscientious, to obey directions of a police officer not exceeding his authority, may interfere with the public order and lead to a breach of the peace."

Present—Kernochan, P. J., Bayes and Brady, J. J.

People vs. Nixon, 248 N. Y. 182.

Lehman, J., on page 188 said:

"*Police officers are guardians of the public order. Their duty is not merely to arrest offenders but to protect persons from threatened wrong and to prevent disorder. In the performance of their duties they may give reasonable directions. Present at the point where the defendant were congregated they might clearly sense the possibility of disorder.* Even a protest from pedestrians who were annoyed by the defendants' conduct might be a significant element in determining whether persistence in such conduct was wrongful. Enough has been shown in these cases to justify the officers in warning the defendants. Refusal to heed the warning so given; persistence in parading the street in groups thereafter, is, perhaps so significant of a contumacious disregard of the rights of others that it supports the finding of guilt of the defendants. In these cases the judgments must be affirmed." (Italics ours.)

People on complaints of Whalen vs. Friedman, 14 N. Y. S. 2nd Series 389, City Magistrates Court, Eighth District, Borough of Brooklyn August 25, 1939.

DeAndrea, City Magistrate, page 392 said:

"Reasonable discretion must in such matters be left to the police, and only when they abuse or exceed that discretion do they transcend their authority and depart from their duty. Failure even though conscientious to obey direction of a police officer often may interfere with the public order and lead to a breach of the peace. *It is not necessary nor does the law contemplate that the police must wait until a breach of the peace has actually occurred before they act. It is their duty to prevent such a breach since they are the guardians of the public order. At the scene of the congregation they might easily anticipate or sense the possibility of disorder.*" (Italics ours.)

Citing—People vs. Nixon, 248 N. Y. 182; People v. Galpern, 259 N. Y. 279.

Judge DeAndrea further says, page 393:

"The mere fact that a group gathered on the streets is peaceful in its aims and innocuous in its manner does not ipso facto eliminate it from a possible application of Section 722 of the Penal Law. A group of persons congregating on a public street may be dispersed although their intent is orderly and inoffensive. Even then it may be said that a breach of the peace may be occasioned." Citing People v. Galpern, 259 N. Y. 279.

Even though the testimony adduced at the instant trial shows that the milling, pushing and shoving had not resulted in any outbreak and there was no actual breach of the peace, yet there was a then present probability of a breach of the peace, there was sufficient evidence to warrant their action and uphold the conviction in that the defendant insisted on speaking after he was warned to cease by the police officer making a breach more probable.

People v. Galpern, 259 N. Y. 279.

Lehman J., on page 261 said:

> "The duty of police officers, it is true, is 'not merely to arrest offenders but to protect persons from threatened wrong and to prevent disorder.' In the performance of their duties they may give reasonable directions."

Lehman, J., on page 282 further said:

> "*Reasonable discretion must, in such matters, be left to them, and only when they exceed that discretion do they transcend their authority and depart from their duty.* The assertion of the rights of the individual upon trivial occasions and in doubtful cases may be ill-advised and inopportune. Failure, even though conscientious, to obey directions of a police officer, not exceeding his authority, may interfere with the public order and lead to a breach of the peace." (Italics ours.)

Lehman, J., on page 284 further said:

> "*Even if we should find that the police officer's interference was unnecessary and in the circum-*

stances ill-advised, we could not find that it was unauthorized. The defendant, knowing the character and standing of his group of friends and that they would not willingly annoy or offend others; might conclude that the interference was officious; the police officer without such knowledge might conclude that it was a useful precaution to avoid possible disturbance. *The law authorized the officer to use his judgment.* Friends may congregate on the sidewalk in an orderly group for a short conversation without creating disorder or unduly offending or obstructing others, *but they must 'move on' when a police officer so directs for the purpose of avoiding disorder which otherwise might ensue.* The Legislature has provided that failure to obey such direction in itself is disorderly conduct. That provision tends to preserve public order on the streets of a great city. A refusal to obey such an order can be justified only where the circumstances show conclusively that the police officer's direction was purely arbitrary and was not calculated in any way to promote the public order. That is not the case here. *The Courts cannot weigh opposing considerations as to the wisdom of the police officer's directions when a police officer is called upon to decide whether the time has come in which some directions are called for.*" (Italics ours.)

Whitney vs. California, 274 U. S. 357.

Mr. Justice Sanford said on page 371:

"That the freedom of speech which is secured by

the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom; and that a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question." Gitlow vs. New York, 268 U. S. 562, 666-668, and cases cited.

Cantwell vs. Connecticut, 310 U. S. 296.

Mr. Justice Roberts said on page 308:

"The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty cannotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets or other immediate threat to public safety, peace or order appears, the power of the State to prevent or punish is obvious."

People v. Hussock, 23 N. Y. S. 2nd 520.

Page 521:

"1. BREACH OF THE PEACE.

A complaint charging that a defendant committed offense of disorderly conduct need not specify the particular subdivision of disorderly conduct statute alleged to have been violated, it being sufficient if the defendant is convicted of the violation of any subdivision of the statute. Penal Law Sec. 722.

Page 522:

2. Where complaint charged that defendant committed offense of disorderly conduct, in violation of subdivision 2 of disorderly conduct statute because he caused a crowd to collect and refused to move on when ordered by policemen, defendant found guilty of refusing to move on when ordered so to do by a policeman was properly convicted although the facts showed a violation of subdivision 3 of the statute, since failure to specify that defendant's conduct constituted a violation of subdivision 3 was immaterial. Penal Law, Sec. 722, subds. 2, 3.

Page 523:

PER CURIAM.

It is clear from the record that although the complaint specifically charged a violation of Subdivision 2 of the said Section 722, the Court found defendant guilty of refusing to move on when ordered so to do by the policeman. In other words, the conviction was based upon a violation of Subdivision 3 of said Section 722 pursuant to which a person may

be adjudged guilty of disorderly conduct who 'congregates with others on a public street and refused to move on when order by the police.' It has been held that under said Section 722, it is not necessary to specify in the complaint the particular Subdivision alleged to have been violated. See People v. Hipple, 263 N. Y. 242, 188 N. E. 725. It is sufficient if the defendant be convicted of the violation of any Subdivision of said Section. In the present case defendant was charged with refusing to move on when ordered so to do and the failure to specify that this constituted a violation of Subdivision 3 of said Section is immaterial. A great deal of appellant's brief is taken up with the contention that said Section 722 as applied by the Court below is unconstitutional in that it deprives defendant of his liberty of assembly, freedom of speech and of the press and of his liberty to worship according to the dictates of his conscience. Appellant further contends that Subdivision 3 of Section 722 of the Penal Law is invalid for the reason that it vests arbitrary and discriminatory power in the police, thereby leaving the question of a violation to the whim of the police. It must be said, however, that most rights under the law are relative and must be exercised with reference to the public weal. From a reading of the record we are of the opinion that defendant was properly convicted of a violation of Section 722, Subdivision 3 of the Penal Law, and that the judgment should be affirmed."

People vs. McWilliams, 22 N. Y. S. 2nd, 571.

This was a hearing, instituted upon a summons charging the defendant with disorderly conduct in violation of Section 722, Subdivisions 1 and 2 of the Penal Law.

Bromberger, City Magistrate on page 574, said:

> "The test in each case is whether the defendant's conduct *under all the circumstances is likely to lead to disorder or public disturbance.* It will be seen that, in applying this test, the courts have necessarily passed judgment upon the competing social interest that would be served by the defendant's freedom of action and those served by penalizing his conduct and utterances as objectionable." (Itlaics ours.)

Quoting from Hague vs. C. I. O., 307 U. S. 496, Judge Bromberger says at page 575:

> "In that case, however, the court specifically said that this right 'may be regulated in the interest of all; it is not absolute, but relative and must be exercised in subordination to the general comfort and convenience and in consonance with peace and good order' * * * 'As in the case of all 'relative' rights, *the point at which conduct in the course of a meeting becomes unlawful must be ascertained by the words employed, the intent of the speaker, the reaction of those there assembled* and to some extent where necessary, *by balancing conflicting social ideas. Against the public interests in freedom of discussion it is necessary to weigh 'general comfort*

and convenience' and the 'peace and good order' of the community." (Italics ours.)

And speaking of Hague vs. C. I. O., Bromberger, City Magistrate, said:

> "The opinion thus recognizes *not only the power of the State to punish abuses of right, but its duty to maintain order in connection with street meetings. The duty is discharged in this State by the enforcement of Section 722 of the Penal Law.*" * * * (Italics ours.)

Quoting further, Bromberger, City Magistrate, says at page 577:

> "In determining the law, there is no need here to consider the question whether there are ever any circumstances under which innocent public gatherings should be penalized solely because the views represented and expressed are offensive to certain groups in the community. Where meetings confined to orderly addressed advocating legislative changes, that question might be relevant. When their inflammatory character results from villifying attacks that far exceed any reasonable bounds of orderly public discussion; *when these attacks are accompanied by evidences of disorder in the group in the meeting thus addressed, or when disorder is threatened not only because of abuse directed at the opposition but also by incitement of the speaker's followers to disorder, the right of public assembly is abused.* The Dunn case establishes beyond question that such abuse of the right constitutes disorderly conduct." (Italics ours.)

In this case the motion to dismiss was denied, a formal complaint was drawn and the defendant was found guilty and paroled for investigation and sentence. He was committed to Bellevue Hospital for observation, pronounced sane and later sentence to the workhouse.

There has been no violation of the constitutional rights of the defendant nor does his conviction violate either the fourteenth or the first amendment of the Federal constitution.

The section of the Penal Law of the State of New York, Section 722, Subdivision 2, is not a law abridging the freedom of speech, the freedom of the press or the right of peaceful public assembly. This section has been construed by our courts (People vs. Pieri, 269 N. Y. 315; People vs. Arcidiaco, 156 Misc. 461; People vs. Berman, 156 Misc. 463). The People recognizes these rights as fundamental rights, rights to be protected and not abused and no argument against such fundamental rights could even be entertained. The People contend that were these rights to be regarded as absolute, as does counsel for the defendant, wherein liberty and privilege are transformed to license. The liberty and freedom which we cherish would be transformed into uncontrollable confusion. The People agree with all that counsel for the defendant says in reference to freedom of speech being a cherished policy of our civilization and further contend that this freedom rather than its abuse is the thing most to be cherished.

There is nothing in this case as tried and decided that even remotely approaches the "suppression of ideas" the

"coercement of sentiment"; "the public guardionship of the public mind" or the thwarting of the "dissemination of views". It was not for the full free expression of the speaker's mind, intemperate though it was, that he was convicted, but because rather, that what he said and did, under all the circumstances had the effect on the assembled crowd to tend to a breach of the peace.

Here there was no previous restraint. The officers present for twenty and thirty minutes respectfully listened and observed. There was no attempt on their part to deny the use of the street for the meeting. There was no abridgment of the right of freedom of assembly. The crowd was assembled and allowed to continue in assembly until the reaction of the crowd to the words of the speaker threatened a breach of the peace. These officers patiently listened to the speaker berate individuals, organizations and the municipal administration, yet they calmly waited. He was allowed to vent his intemperate views without interruption. Surely here there was no denial to him of his right of freedom of speech, for he spoke for half an hour and could have continued indefinitely had not the tenor of his urgings had the effect on the crowd to cause it to become unruly to the point where the police were questioned as to their ability to handle the situation. These police had a picture of a situation that was fast heading toward an outbreak and who can say that they should have acted otherwise than they did. Counsel in his petition states that but two minutes elapsed from the time request was made of Feiner to terminate his speech and his being taken down from the box. The record says, insofar as the testimony of Officer Cook, page 64, is concerned, that Officer Cook's answer to have been "Maybe four or five minutes", during which

time Feiner continued in defiance of Officer Flynn's request. Much could happen in four or five or even two minutes in a surging crowd.

The petitioner had his freedom of speech and of assembly without any previous restraint or interruption, he used it, and then abused it. The abuse resulted in his violation of a state statute many times construed as to its constitutionality by the Court of Appeals of the State of New York. His abuse of the privileges, that were never denied him, resulted in the offense for which he was convicted. It is stretching constitutional privilege and guarantees to a point inconceivable, to claim this privilege as a defense to an offense against the dignity of the State.

The People recognize and subscribe to all that our courts, both State and Federal, have enunciated as to the constitutional guarantees of freedom of speech and freedom of assembly, as the cornerstone of democracy but are just as firmly impressed that certain curbs on such freedoms are essential to the preservation of this democracy. The proper checks are equally essential to the privileges.

Counsel's argument that the within "conviction makes speech and assembly subject to abridgment and penalty. It subjects speech and assembly to censorship by a police officer whenever, in his personal judgment what is being said or the purpose of the assembly is objectionable to him" is wholly without merit and in no way substantiated by anything in the record. There is no evidence in this record as to what the personal view of either officer was or that he or they had any personal reaction to the speech. The record does show that they interrupted the meeting to prevent actual disorder. They might even have agreed

with the speaker and yet as police officers performed their duty to preserve order. The further statement of counsel for the petitioner that "The essence of this case is that a public meeting, called by a group of citizens to discuss a public issue was broken up and a speaker arrested because the police officers or some onlookers disapproved of the meeting or the speech" is equally untrue and a very unworthy attempt to misstate facts to the court. Counsel is attempting to minimize the abuse of the freedom by the petitioner, and to blame the peace officers for the petitioner's intemperance, resulting as it did in a threatened breach of the peace. The falacy of counsel's reasoning is his unwillingness to concede that there ever could be any limitation placed on freedom of speech or assembly and reasons as if to contend that regardless of disorder or threatened disorder a speaker is never subject to restraint so long as these freedoms are guaranteed. These police officers didn't make any arrest because of unrest in the crowd or because the speech inspired anger or resentment but only when this unrest, resentment and anger grew from a passive state of mental resentment into a positive phyical state of threatened and impending disorder.

There was no coerced conformity or limitation of freedom of discussion. There was no attempt by police officers or listeners or both, who disapproved of the subject matter of a meeting to deny the constitutional right of the speaker to speak and his listeners to hear his views. There is no evidence in the record of this case that the police entertained any opinions as to the subject matter of petitioner's speech or that their action was based on such opinion. No one was kept from joining, or remaining in the crowd. The subject matter was absolutely immate-

rial. As the trial judge, in substance said, the petitioner had a perfect right to be rude and speak intemperately. The police were not acting as censors of a speech. They were, however, guardians of public order and there is no evidence that they acted other than in that capacity. They did not make an arrest because of any disagreement with the speaker's views but because he was guilty of disorderly conduct in bringing about a condition where a breach of the peace was threatened and refusing to discontinue when properly requested to do so. Certainly here was a clear and present danger that justified police action. They could choose between allowing the speaker to continue with disorder attending, and preserving order by causing the speaker to desist.

The courts both State and Federal while upholding the rights of freedom of speech, of assembly and of the press have always recognized the necessity of proper curbs on these freedoms.

It is unthinkable that our courts would do other than to apply checks and balances in deciding cases wherein freedom of speech, press and assembly are made the issue in a defense to other charges made, and it is well recognized that nowhere, either in State or Federal Courts have these freedoms been recognized as absolute. The evil consequences of the abuse of those privileges have been so numerous that, for the protection of these very rights, the courts championing them have placed a standard beyond which one in their enjoyment may not go. .. long line of cases hold that the rights guaranteed by the First and Fourteenth Amendments are subordinate to the greater rights of the general public interest, and to the right of the

government to maintain and protect itself, and subject to reasonable restriction when necessary to safeguard that public interest.

A synopsis of the holdings in the following cases substantiates this contention.

People v. Gitlow, 266 U. S. 652, pp. 666-670.

This case was before the Supreme Court on a Writ of Error to the Supreme Court to which the record was remitted. The contention was that the statute by its terms and as applied was repugnant to the due process clause of the Fourteenth Amendment.

On page 666, Mr. Justice Sanford says:

> "It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse freedom" * * *

On page 667, Justice Sanford further says:

> "That a state in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime or disturb the public peace is not open to question."

Citing:

Robertson vs. Baldwin, 165 U. S. 275, 281.

Patterson vs. Colorado, 205 U. S. 454, 462.

Fox vs. Washington, 236 U. S. 273, 276.

Gilbert vs. Minnesota, 254 U. S. 325, 332.

Warren vs. United States (C. C. A.), 183 Fed. 718, 721.

People vs. Most, 171 N. Y. 423, 431.

State vs. Holm, 139 Minn. 267, 275.

State vs. Hennesy, 114 Wash. 351, 359.

State vs. Boyd, 86 N. J. L. 75, 79.

State vs. McKee, 73 Conn. 18, 27.

Further on page 668, he says:

"Every presumption is to be indulged in favor of the Statute * * * and the case is to be considered in the light of the principle that the State is primarily the judge of the regulations required in the interest of public safety and welfare."

And on page 669, he says:

"It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbance of

the public peace or imminent and immediate danger of its own destruction; but it may in the exercise of its judgment suppress the threatened danger in its incipiency."

Again on page 670, he says:

"When the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involved such danger of substanstive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substanstive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition."

The reasoning here is most applicable to the within case for the facts clearly show that a breach of the peace might easily have been occasioned.

Bridges Hardware Co. v. Horowitz,
93 N. Y. S. 2nd 323.

"The rights of free speech, right to strike, and right to persuade and gain sypathizers with, and converts to, the cause of unionism does not include or give the right to employees on strike to abuse or intimidate and insult, employers, strike breakers, and customers."

Walter, J. on page 328 says:

"Such picketing is neither peaceful nor lawful. Neither the right of free speech, nor the right to

strike, nor the right to persuade and gain sympathizers with, and converts to the cause of unionism includes or gives the right to abuse or intimidate or insult employers, strike breakers or customers and such acts may and should be enjoined."

United States v. Foster, 9 F. R. D. 367.

Constitutional rights of freedom of speech and of the press are not denied by conviction for violation of a statute making it unlawful to advocate or organize any group of persons who advocate the overthrow or destruction of the government by force or violence or to conspire to do so.

Medina, District Judge, on page 390 says:

"But no one could suppose nor is it the law that any person has an absolute and unbridled right to say or to write and to publish whatever he chooses under any and all circumstances. If he did have such a right and if such were the law, the words 'We, The People of the United States, in order to form a more perfect union, establish justice, *insure domestic tranquility*, provide for the common defense, *promote the general welfare* and secure the Blessings of Liberty to ourselves and our posterity, do ordain and establish this Constitution of the United States of America' as contained in the Preamble to the Constitution, would be no more than empty phrases. Doubtless you observed that I placed emphasis on the 'insure domestic tranquility' and 'promote the general welfare' clauses of the

preamble. Words may be the instruments by which crimes are committed as in many familiar situations; and it has always been recognized that the protection of other interests of society may justify reasonable restrictions upon speech in furtherance of the general welfare." (Italics ours.)

Marshall v. United States, 176 Federal
Reporter 2d, 473, 474.
United States Court of Appeals
District of Columbia Court.

In this case the appellant attacked the constitutionality of the resolution creating the committee on Unamerican Activities on the ground that it abridged freedom of speech and press guaranteed by the First Amendment to the Constitution. The court held the contention to be without merit and holding that the rights guaranteed by the First Amendment are not absolute and are subordinate to the greater rights of the general public interest, and the right of the government to maintain and protect itself.

Sweeney, District Judge, sitting in Circuit Court by designation, says on page 474:

"The claim that the Resolution is unconstitutional in its application to the facts of the case because it abridges freedom of speech and press guaranteed by the First Amendment to the Constitution is without merit. The rights guaranteed by the First Amendment are not absolute and are subordinate to

the greater rights of the general public interest, and to the right of the government to maintain and protect itself."

American Communications Association C. I. O. et. al. vs. Douds United Steel Workers of America, et al. vs. National Labor Relations Board 70 Supreme Court Reporter 674 pp. 683 685.

In his opinion in the foregoing cases, on page 683, Mr. Chief Justice Vinson says:

"When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity."

And on page 684:

"On the contrary, however, the rights of the public to be protected from evils of conduct, even though First Amendment rights of persons or groups are thereby in some manner infringed has received frequent and consistent recognition by the Court." * * *

As Chief Justice Hughes put it:

"Civil liberties as guaranteed by the Constitution imply the existence of an organized society, maintaining public order without which, liberty itself would be lost in the excess of unrestrained abuses."

And on page 685:

"The deference due legislative determination of the need for restriction upon particular forms of conduct has found repeated expression in this Court's opinions."

U. S. v. Painters Local Union #481,
79 Fed. Supp. 516.
District Court, District of Connecticut.

In speaking of the first amendment held that, Rights protected by his amendment, forbidding laws impairing freedom of religion, speech or press or right of people peaceably to assemble and petition, are subject to reasonable restrictions when necessary to safeguard public interest.

Hincks, District Judge, on page 522 says:

"At first glance, at least, it would not seem that an act which goes no further than to regulate aggressions both of capital and of labor in their expenditures could be deemed, as the defendants contend, an unlawful abridgment of the rights of free speech, press and assembly. But even if the Act does result in some incidental restrictions of rights protected by the First Amendment, it does not necessarily follow that an unlawful abridgment has resulted. For the rights protected by the First Amendment are not absolute; it is well established that they are subject to reasonable restrictions when necessary to safeguard the public interest."

U. S. v. Korner, 56 Fed. Supp. 242
District Court, S. D. California.

The liberties protected by this amendment are not absolute liberties but are subject to a restraint tolerated under the clear and present danger rule.

Hall, District Judge, on page 247 says:

"The next proposition is to determine the extent of the liberties of the First Amendment. In that connection it must be regarded as also settled that the liberties of the First Amendment are not absolute liberties but are subject to a limited restraint. But such restraint is tolerated by our Constitution only under what has now come to be known as the 'clear and present danger' rule."

Kiyaski Okamoto vs. United States,
152 F. 2d 905
Circuit Court of Appeals, Tenth Circuit.

The constitutional rights of freedom of speech, freedom of press and freedom of assembly though fundamental are not absolute.

Bratton, Circuit Judge, on page 907 says:

"Freedom of speech, freedom of the press and freedom of assembly guaranteed by the First Amendment are fundamental rights, but though fundamental they are not in their nature absolute. These rights are not unbridled license to speak, publish or assemble without any responsibility what-

ever. Their exercise is subject to reasonable restriction required in order to protect the Government from destruction or serious injury. The delicate and difficult question usually presented is whether speech, press or assembly are of such a nature as would produce or are calculated to produce a clear, present and imminent danger of a substantive evil which Congress has the Constitutional power to prevent."

National Labor Relations Board v. M. E. Blatt Co., 143 F. 2d 268 Circuit Court of Appeals, Third Circuit.

The constitutional guaranty of freedom of speech does not guarantee him who speaks immunity from the legal consequences of his verbal actions.

Biggs, Circuit Judge, on page 274, says:

"The guaranty of freedom of speech contained in the First Amendment does not guarantee him who speaks immunity from the legal consequences of his verbal actions."

In re Porterfield, 168 P. 2d 706; 28 Cal. 2d 91; 167 A. L. R. 675.

The right of free speech protected by this amendment (First) and the Fourteenth Amendment Constitution of California Article 1, Sections 1, 3, 9, 13, is not an absolute right which carries with it into business and profressional total immunity from

regulation in the performance of acts to which speech is a mere incident.

Schauer, Justice, on page 713, says:

"A municipality may impose reasonable conditions upon the conduct of business. The right of free speech protected by the federal and state constitutional guarantees is not an absolute right which carries with it into business and professions total immunity from regulation in the performance of acts as to which speech is a mere incident. It was not intended that a right to speak for the purpose of profit may be created to the derogation of the police power of state or city. *The main purpose of such constitutional provisions was to prevent previous restraint* of (as had been imposed by other governments and in earlier times in this country) or the stifling of efforts pointing toward enlightment of individuals upon or concerning their rights and beliefs and the duty of their rulers."

And on page 714 he says:

"It has often been said that it is only when it clearly appears that an ordinance or statute passes definitely beyond the limits which bound the police power and infringes upon rights secured by the fundamental law, that it should be declared void."

Hill v. State ex rel Watson, 19 S. O. 2d 857; 155 Fla. 245 Supreme Court of Florida.

The guarantees of freedom of speech, free press,

and free assembly are not absolute but are subject to reasonable police regulations in the interest of the public.

Tenell, Justice, on page 859, says:

"Appellants contend that these regulations unduly restrict their freedom of speech and free assembly. This contention overlooks the fact that none of these guarantees are absolute but are subject to reasonable police regulations in the interest of the public."

And on page 861 he says:

"The sole test for the exercise of the police power is reasonableness. True the Legislature cannot under the guise of the police power arbitrarily invade personal or property rights or interfere with private business, but if the statute has some rational relation to the safety, health and morals or general welfare and the means employed may be reasonably said to accomplish the desired purpose, it is within the scope of the police power. The means adopted by the act must be reasonably necessary. They must be reasonable in their effect on the person, must not be oppressive and must not be designed to the annoyance of any particular person or class."

And on page 862 he says:

"The purpose of the regulation is not punic but to preserve the democratic process and bring to the knowledge of the individual or group regulated that it has *an obligation to the public that rises above its personal or group interest.*" (Italics ours.)

Stanton v. Board of Education,
City of New York, 76 N. Y. S. 2d 559.
Supreme Court, Special Term,
Kings County—Part I.

A person may believe in and proclaim a doctrine with which others may not agree, but he may not abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, *disturb the public peace*, endanger the foundations of organized constitutional government or threaten its overthrow by force. (Italics ours.)

Froessel, Justice, on page 561, says:

"On the other hand it must be recognized that this right under our Constitutions is not without its limitations. Absolute freedom includes the right to impose one's will upon another even to the point of enslavement. No one can contend for such freedom under our Constitutions. The rights of speech and assembly are subject to the rights of others as well as of the state. As was said in Gitlow v. New York, 268 U. S. 652, 45 S. Ct. 625, 69 L. Ed. 1138, 'It is a fundamental principle long established, that the freedom of speech and of the press which is secured by Congress, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. (Citing cases). Reasonably limited, it was said by Story in the passage cited this freedom is an inestimable privilege in a free

government, *without such limitations it might become the scourge of the republic.* * * * A state may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means * * *. In short, this freedom does not deprive of the primary and essential right of self preservation; which so long as human governments endure, they cannot be denied." (Italics ours.)

And on page 564 he said:

"As I indicated upon the argument, the law is well established that courts will not interfere with the exercise of discretion entrusted by law to public officers or bodies unless it be clearly demonstrated that the act complained of voilates a specific statute or is essentially arbitrary.

Bowe vs. Secretary of The Comm.,
69 N. E. 2d 115,
Supreme Judicial Court of Massachusette, Suffolk.

Freedom of the press, of speech, and of assembly are subject to reasonable regulations in interest of the public, but complete freedom remains the rule unless and until regulated or restricted on rational grounds relating to the public welfare.

Lummus, Justice, on page 129, says:

"It is true that the three freedoms under discussion are not absolute. Constitutional freedom means liberty regulated by law. * * * Liberty is immunity

from arbitrary commands and capricious prohibitions but not the absence of reasonable rules for the protection of the community. * * * All three freedoms under discussion are subject to reasonable regulations in the interest of the public. * * *

But complete freedom remains the rule, unless and until regulated or restricted on rational grounds relating to the public welfare."

Slater v. Salt Lake City
206 P. 2d 153
Supreme Court of Utah.

The constitutional right of free speech is subject to reasonable regulations.

Latimer, Justice, on page 157, says:

"Mr. Justice Reed places the constitutional right of freedom of speech in a preferred position, or on a higher plane than other rights, while Mr. Justice Frankfurter takes a contrary view. However, both agree that regardless of its position, the right is subject to reasonable regulations.

Of course, even the fundamental rights of the Bill of Rights are not absolute * * * the hours and place of discussion can be controlled. * * *

The most stringent protection of free speech would not protect a man falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effects of force. * * *

The right to speak one's mind would often be an empty privilege in a place and at a time beyond the

protecting hand of the guardians of public order. * * * The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience."

Emden v. Vitz, 198 P. 2d 696
District Court of Appeals, Second District Division 3, California.

The constitutional right of freedom of speech is not a license for commission of crime or the malicious oppression of one fellow citizens.

Shinn, Presiding Justice, on page 700, says:

"Appellants also claim that the judgment infringes upon their constitutional right of freedom of speech. We mention the point only to remark that the right is not a license for the commission of crime or the malicious oppression of one's fellow citizens. A decent respect for the rights of free speech requires that it be protected against abuse."

Kovcas v. Cooper, 50 A. 2d 451
Supreme Court of New Jersey.

The freedom of speech and assembly as preserved by state and federal constitutions are not absolute but may be curtailed under a reasonable exercise of the police power where the public health, safety and general welfare of a community demand.

Wachenfeld, Justice, on page 452, says:

"While the freedom of speech and assembly are

enunciated and preserved by the New Jersey and United States Constitutions, these freedoms are not absolute but may be curtailed under a reasonable exercise of the police power where the public health, safety and general welfare of the municipality demand. * * * Civil liberties as guaranteed by the Constitution imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excess of unrestricted abuses."

Krasner v. State, 26 So. 2d 519
Court of Appeals of Alabama.

The freedom of speech and of the press does not confer an absolute right to speak or publish, without responsibility whatever one may choose or an unrestricted or unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.

Harwood, J., on page 523, says:

"These rights and privileges are not absolute. They do not confer a right of licentious action. The freedom of the press and of speech, which Congress, by the First Amendment to the Federal Constitution is prohibited from abridging says: 'That this amendment was intended to secure to every citizen an absolute right to speak, or write, or print whatever he might please without any responsibility public or private, therefore is a supposition too wild to be induged by rational man * * * It is plain, then, that the language of this amendment imports no

more than that every man shall have a right to speak, write and print his opinions upon any subject, without prior restraint, so always that he does not injure any other person in his rights, person, property or reputation and so always that he does not thereby disturb the public peace or attempt to subvert the government'. Story on the Constitution 5th Ed. 634, 635.

It is a fundamental principle, long established that the freedom of speech and of the press which is secured by the Constitution does not confer an absolute right to speak or publish, without responsibility whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom."

Alabama State Federation of Labor
v. McAdory, 18 So. 2d 810; 246 Ala. 1
Supreme Court of Alabama.

The State under its police power may enact laws which interfere indirectly and to a limited extent with the right of speech or liberty of people if reasonably necessary for protection of general public.

Gardner, Chief Justice, on page 822, says:

"and as observed in Carpenters and Joiners Union v. Ritters Cafe, supra.

Where, as here, claims on behalf of free speech are met with claims on behalf of the authority of the state to impose reasonable regulations for the protection of the community as a whole. The duty

of this court is plain. Whenever state action is challenged as a denial of 'liberty' the question always is whether the state has violated the essential attributes of that 'liberty' * * * while the right of free speech is embodied in the liberty safeguarded by the Due Process Clause, that clause postulates the authority of the states to translate into law local policies to promote the health, safety, morals and general welfare of the people."

Meadowbrook Dairies v. Milk Wagon Drivers Union of Chicago, 21 N. E. 2d 308
Supreme Court of Illinois.

The privilege of free speech cannot be used to the exclusion of other constitutional rights nor as an excuse for unlawful activities.

Gunn, Justice, on page 816, says:

"The right to acquire and protect property is an inherent right not given but declared by the Constitution. The privilege of free speech cannot be used to the exclusion of other constitutional rights, nor as an excuse for unlawful activities."

State v. Cox, 16 A. 2d 508 Supreme Court of New Hampshire.

An ordered freedom is all that is secured by the guaranty of freedom to worship, freedom of speech and freedom of the press.

Allen, Chief Justice, on page 512, says:

"The right of speech is an incident of the right of highway travel but the right of highway travel is not inherent in the right of speech."

And on page 515, he says:

"An ordered freedom is all that the guaranty of individual rights secures. Maintenance of order neither abridge or denies freedom."

People v. Winters, 48 N. Y. S. 2d 230.

Freedom of speech and press guaranteed by state constitution does not imply complete exception from responsibility for everything a citzen may say or publish.

Cohn, Justice, on page 232, says:

"The freedom of speech and of the press which is secured by such a constitutition guaranty does not imply complete exemption from responsibility for everything a citizen may say or publish. Indeed the state Bill of Rights expressly provides that a person exercising the freedom is responsible for the abuse of the right.

Pursuant to the police power and without abridging freedom of the press the state may enact reasonable regulations to protect the general welfare, public safety and order, and public morals."

People v. Richards, 31 N. Y. S. 2nd 457, District Court of New York, Nassau County.

The rights of assembly and free speech are relative and may be regulated in the interests of all, and must be exercised in subordination to the general comfort and convenience and in consonance with peace and good order.

Greason, J., on page 461, says:

"Nothing indicates that the State Park Commission by its ordinances has attempted to tamper with the rights of assembly and free speech—it being remembered that these rights are not absolute, but relative—that these rights may be regulated in the interest of all and must be exercised in subordination to the general comfort and convenience and in consance with peace and good order."

Chaplinsky v. New Hampshire, 315 U. S. 568.

Mr. Justice Jackson, in his opinion, on page 571 said:

"Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well defined and narrowly limited classes of speech the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous and the insulting

or fighting words, those *which by their very utterance inflict injury or tend to incite an immediate breach of the peace.*" (Italics ours.)

And on page 572 he further said:

"It has been well observed that such utterances are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Resort to epithets or personal abuse is not in any proper sence communication of opinion safeguarded by the constitution and its punishment as a criminal act would raise no question under that instrument.

We are unable to say that the limited scope of the statute thus construed contravenes the constitutional right of free expression. It is a statute narrowly drawn and limited to define, and punish specific conduct lying within the domain of state power, *the use in a public place of words likely to cause a breach of the peace.*" (Italics ours.)

Shively v. Garage Employees Local Union #44, 108 P. 2d 354
Supreme Court, Washington.

The right of the freedom of speech guaranteed by the Federal Constitution is not an absolute right which may be exercised without any qualifications, but like other rights must be exercised with reasonable regard for the conflicting rights of others.

Jeffers, J., on page 357, said:

"We are therefore now confronted with the question of whether the constitutional guaranty of freedom of speech is an absolute right, which may be exercised without any qualifications, or whether, like other rights, it must be exercised with reasonable regard for the conflicting rights of others.

We are of the opinion the right of freedom of speech is not absolute."

And on page 358 he further said

"The Fourteenth Amendment cannot be invoked as a mantle of protection under which the wrong doer can plead immunity from the judicial processes of our courts."

Taylor v. State, 11 So. 2d. 663
Supreme Court, Mississippi.

The constitutional right of free speech does not mean the unbridled license of speech, and the abuse of the right may be punished under the police power.

Roberts, J., on page 667, said:

"Even in peace time the right of free speech does not mean unbridled license of speech. The right may be abused, for which abuse punishment may be meted out under the police power of the State. The Constitution protects the right but not the abuse. For instance, one has no right, even in times of peace to use language, oral or written, which wrongfully injures another in person or prop-

erty, or tends to corrupt public morals, induce crime, endanger the public safety * * *"

State v. O'Donnell, 200 A. 739
Supreme Court, New Jersey.

The Disorderly Persons Act (N. J.) is a valid exercise of the police power and not an abridgment of the right of free speech.

Donges, J., on page 740, said:

"The argument is that the act was designed to prevent street brawls and disorder, and that a statement made in the course of a speech to a street meeting lawfully held does not constitute disorderly conduct. The difficulty is that the section under consideration defines as a disorderly person any person who shall 'indulge in and utter loud or offensive or indecent language'. The complaint is in the language of the statute and is therefore good."

And on page 741 he further said:

"There is nothing in the statute which abridges the right of free speech. It says that loud and offensive talk is disorderly. Defendant might have said anything he wished, and if he had not said it loudly or if it had not been offensive there would have been no violation of the statute. The act is clearly a valid exercise of the police power."

State v. Klaprott, 22 A. 877
Supreme Court of New Jersey.

Statutes regulating freedom of speech, or free-

dom of the press, are upheld if they are directed at abuses which menace the state itself, such as utterances inimical to public welfare or tending to corrupt public morals, incite to crime or disturb public peace.

Brogan, J., on page 880, said:

"Statutes that regulate speech, or of the free press that have been upheld as not in conflict with our fundamental law are those directed at abuses, which menace the State itself."

Whitney v. California, 274 U. S. 357.

Right of free speech is not absolute right to speak without responsibility, and under police power State may punish utterances inimical to public welfare.

Mr. Justice Sanford, on page 371, said:

"That the freedom of speech which is secured by the Constitution does not confer an absolute right to speek, without responsibility, whatever one may choose or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom; and that a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace or endanger the foundations of organized government and threaten its overthrow by unlawful means,

is not open to question." *Gitlow vs. New York*, 268 *U. S.* 562, 666-668, *and cases cited.*

Robertson v. Baldwin, 165 U. S. 275, 281.

Mr. Justice Brown, on page 281, said:

"The law is well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights were not intended to lay down any novel principles of government, but simply to embody certain guarantees and immunities which we had inherited from our English ancestors, and which from time immemorial had been subject to certain well recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus the freedom of speech and of the press (Art. 1) does not permit the publication of libels, blasphemous or indecent articles, or other publication injurious to public morals or private reputation; * * *"

Paterson v. Colorado, 205 U. S. 454, 462.

Mr. Justice Holmes, on page 462, said:

"* * * But even if we were to assume that freedom of speech and freedom of the press were protected from abridgment on the part not only of the United States but also of the States, still we should

be far from the conclusion that the plaintiff in error would have us reach. In the first place, the main purpose of such constitutional provisions is 'to prevent all such *previous restraints* of publications as had been practiced by other governments' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare (Commonwealth v. Blanding, 3 Pick 304, 313, 314; Respubica v. Oswald, 1 Dallas 319, 325). The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from the statute in most cases if not in all. (Commonwealth v. Blanding ubi sup 4, Bl Comm 150)" (Italics ours.)

Gilbert v. Minnesota, 254 U. S. 325, 332.

On pages 332 and 333, Mr. Justice McKenna, said:

"The next contention is, that the statute is violative of the right of free speech, and therefore void. It is asserted that the right of free speech is a natural and inherent right, and that it, and the freedom of the press, were 'regarded as among the most sacred and vital possessed by mankind, when this nation was born, when its constitution was framed and adopted.' And the contention seems necessary for the plaintiff in error to support. But without so deciding or considering the freedom asserted as guaranteed or secured either by the Constitution of the United States or by the constitution

of the State, we pass immediately to the contention and for the purposes of this case may concede it, that is, concede that the asserted freedom is natural and inherent, but it is not absolute, it is subject to restriction and limitation. And this we have decided. In Schenck v. United States, 249 U. S. 47, 52, we distinguished times and occasions and said that 'the most stringent protection of free speech would not protect a man in falsely shouting fire in a threatre and causing a panic'; and in Frohwerk v. United States, 249 U. S. 204, 206; we said 'that the First Amendment while prohibiting legislation against free speech as such cannot have been and obviously was not intended to give immunity for every possible use of language.' See also, Debs v. United States, 249 U. S. 211; Abrams v. United States, 250 U. S. 616. In Schaefer v. United States, 251 U. S. 466, commenting on those cases and their contentions it was said that the curious spectacle was presented of the Constitution of the United States being invoked to justify the activities of anarchy or of the enemies of the United States, and by a strange perversion of its precepts it was adduced against itself. And we did more than reject the contention, we forestalled all repetitions of it, and the contention in the case at bar is a repetition of it. It is a direct assault upon the statute of Minnesota, and a direct assertion in spite of the prohibition of the statute that one can by speech, teach or advocate that the citizens of the State should not aid or assist 'the United States in prosecuting or carrying on war with the public enemies of the

United States', and be protected by the Constitution of the United States."

People v. Most, 171 N. Y. 423, 431.

Vann, J., on page 431 says:

"While the right to publish is thus sanctioned and secured, the abuse of that right is excepted from the protection of the Constitution, and authority to provide for and punish such abuse is left to the legislature. The punishment of those who publish articles which tend to corrupt morals, induce crime or destroy organized society, is essential to the security of freedom and the stability of the state. While all the agencies of government, executive, legislative and judicial, cannot abridge the freedom of the press, the legislature may control and the courts may punish the licentiousness of the press. 'The liberty of the press,' as Chancellor Kent declared in a celebrated case, 'consists in the right to publish, with impunity, truth, with good motives, and for justifiable ends, whether it respects governments, magistracy or individuals.' (People v. Croswell, 3 Johns. Cas. 336, 393.) Mr. Justice Story defined the phrase to mean 'that every man shall have a right to speak, write and print his opinions upon any subject whatsoever, without any prior restraint, so always, that he does not injure any other person in his rights, person, property or reputation; and so always, that he does not thereby disturb the public peace, or attempt to subvert the

government.' (Story's Commentaries on the Constitution, Section 1874.)"

Warren v. United States (C. C. A.)
183 Fed. 718, 721.

Hook, Circuit Judge, on page 721, said:

"Liberty and freedom of speech under the constitution does not mean the unrestrained right to do and say what one pleases at all times and under all circumstances, * * * The very idea of government implies some imposition of restraint in the interest of the general welfare, peace, and good order."

State v. Holm, 139 Minnestota, 267,
275.

Taylor, C., on page 275, said:

"Defendants also contend that the statute abridges the freedom of speech and of the press secured to citizens of the United States by the first section of the Fourteenth Amendment to the Federal Constitution. To what extent this amendment takes from the states the power to place legislative restrictions upon the freedom of speech and the freedom of the press is still a mooted question; but conceding that it protects this right from abridgment by the states, the freedom secured thereby is not an unlimited license to speak and to publish whatever one may choose. It is settled that the state may prohibit publications or teachings which are injuri-

cus to society, or which tend to subvert or imperil the governmental duties without infringing the constitutional provisions which preserve freedom of speech and of the press. These constitutional provisions preserve the right to speak and to publish without previously submitting for official approval the matter to be spoken or published, but do not grant immunity to those who abuse this privilege, nor prevent the state from making it a penal offense to publish or advocate matters or measures inimical to the public welfare."

State v. Hennessy, 114 Washington, 351, 359.

Main, J., in quoting from the opinion in State v. Fox, 71 Wash, 185, said at page 359:

"While the constitutions of the United States and of this state guarantee the right to freely speak, write, and publish upon all subjects, it is not meant thereby that persons may with impunity advocate disregard of law; or as was said in People v. Most, 171 N. Y. 423, 64 N. E. 175, 58 L. R. A. 509 'While the right to publish is thus sanctioned and secured, the abuse of that right is excepted from the protection of the constitution, and authority to provide for and punish such abuse, is left to the legislature. The punishment of those who publish articles which tend to corrupt morals, induce crime or destroy organized society is essential to the security of freedom and the stability of the state'."

State v. Boyd, 86 N. J. L. 75, 79:

Parker, J., on page 79, said:

> "The fundamental answer to the point raised is that free speech does not mean unbridled license of speech, and that language tending to the violation of the rights of personal security and private property, and towards breaches of the public peace is an abuse of the right of free speech for which, by the very constitutional language invoked, the utterer is responsible."

The reasons relied upon by counsel for the petitioner for allowance of the Writ are not based on the true facts of the record and the cases cited in support of the petition were decided on grounds entirely different from those that lie in the within conviction.

With counsel's many quotations and extracts enunciating fundamental constitutional principles there is and could be naught but approval, but these laudable expressions bespeak liberty of expression and not the license of disregard of these same principles.

The cases so fully cited by counsel for the defendant are replete with axiomatic pronouncement as to freedom of speech, press and assembly each case in itself gives expression to fundamental constitutional principles, lofty sentiments and truths to which we must subscribe but the principle involved in no one of the cases cited is pertinent to the within case. The occasion for their expression by eminent jurists arose from appeals to the higher courts on facts entirely different and totally dissimilar from those

herein and were decided on grounds entirely different from those that lie in the within appeal.

Petitioner's counsel argues that the petitioner was convicted and his fundamental rights abridged merely to prevent public inconvenience or annoyance ignoring the finding of fact, that enjoying the privilege of free speech and free assembly, he was, as a result of the abuse of the privilege found guilty, not of causing inconvenience or annoyance but of the offense of Disorderly Conduct and he speaks of continuous pervasive restraint on all freedom of discussion, again ignoring his uninterrupted thirty minutes of speaking. Judge Bamerick did not deny to the petitioner any freedom of discussion. He heard the evidence and made a decision giving frankly his reasons therefor. There is nothing ambiguous about the statute under which petitioner was convicted and it most certainly is sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. It is conceded that many statutes have been properly construed by this high court as being vague and indefinite but the clear, concise definite language of Section 722 of the Penal Law of the State of New York is not within such definition or within the decisions in any of the cases cited by counsel. This statute has stood for over a quarter of a century as a proper standard in the measurement of disorder and as an instrument in promoting and protecting an orderly society.

The following comments are offered as to the cases cited by petitioner in support of his application for the Writ.

Arthur Terminiello vs. City of Chicago, 337 U. S. 1.

Counsel sets forth this case as being a complete defense to the defendant Feiner and cites it as a striking parallel. The parallel is only as to the coincidence in the handing down of the decision and the conviction of the defendant in this case. It is similar in that unwholesome and interperate speech was indulged in by the defendant Terminiello which resulted in riot and disorder. The fact that the conviction in the Chicago court was reversed is in no sense an endorsement of the disorder and chaos as being inseparable consequences to freedom of speech and assembly. Counsel argues as if to say: If Terminiello wasn't guilty after causing a riot, how, then, could Feiner be guilty, he having but caused a threatened breach of the peace. Truly a garbled public opinion as to what his case actually decided prevails but no good reasoning will ever stamp it as an endorsement of disorder. Terminiello's guilt or innocence as to his actual acts was never passed upon by the United States Supreme Court nor can the decision be considered as an exoneration for him.

The court passed only on the legality of the conviction in view of an erroneous construction by the trial judge of the ordinances under which he was tried and convicted. It being impossible to tell whether the jury found him guilty wholly or partially by reason of the improper construing of the ordinance or whether the improper construction was a factor in their verdict, yet it was there and could have been the determining factor and the court was very properly constrained to reverse the verdict. There is little doubt that no one of the judges of this high court enter-

tained any doubts as to this defendant's guilt as to his intemperate language being a factor in promoting disorder, but agreed that with a clearly unconstitutional interpretation of an ordinance as a possible determining factor in the jury's decision the court very properly reversed the decision. The constitutionality of the ordinance under which he was tried and convicted was never raised during the trial or appeal but the court, on the case reaching them, did construe it as unconstitutional in the manner interpreted by the trial judge.

In the Terminiello case the interpretation placed on the Chicago ordinance by the trial judge permitted conviction if his speech stirred people to anger, invited public dispute or brought about a condition of unrest and under that construction there could have been a conviction regardless of whether there was a breach of the peace or a threatened breach of the peace.

While in the within case Judge Bameriek made no interpretation of the statute that was in any way violative of the defendant's rights. He, in fact, emphasized the petitioner's rights of free speech and assembly even though the speaker used bad taste, and held that the petitioner was within his strict legal right in speaking intemperately. When the court in their opinion in the Terminiello case, speaking of the function of free speech, said "It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger" they might well have added "but not when it incites to disorder or threatened disorder". I am sure the court had in mind a mental or thinking unrest and not a physical unrest. I believe they

had in mind dissatisfaction which can and should exist without disorder—something that would make them more conscious of the body politic or social; that the "stirring to anger" should be a keen conscious disapproval of existing conditions and not a physical anger that would breed disorder. By the very nature of the basis of decision in the Terminiello case there can be no parallel to the within case.

While not in any manner questioning the majority opinion in this case where the facts concerning the disorder were not passed upon yet the dissenting opinion of Mr. Justice Jackson as therein expressed disregarding the constitutional question of the Chicago ordinance and reasoning from the view point of the actual disorder is such an opinion as covers the precise situation presented in the within case, were the constitutional question of the erroneous charge not present doubtless it would have been a majority opinion.

Mr. Justice Jackson, dissenting, said on page 13:

> "But the local court that tried Terminiello was not indulging in theory. It was dealing with a riot and with a speech that provoked a hostile mob and incited a friendly one and threatened violence between the two."

And in speaking of the trial judges instruction to the jury on page 13 further said:

> "He was addressing his words to the concrete behavior and specific consequences disclosed by the evidence."

He was saying to the jury, in effect, that if this particular speech added fuel to the situation already so inflamed as

to threaten to get beyond police control it could be punished as inducing a breach of the peace.

On page 14 he further said:

> "This Court seems to regard these as enemies of each other and to be of the view that we must forego order to achieve liberty. So it fixes its eyes on a conception of freedom of speech so rigid as to tolerate no concession to society's need for public order.
>
> An old proverb warns us to take heed lest we 'walk into a well from looking at the stars.' "

On page 24 he further said:

> "This drive by tolitarian groups to undermine the prestige and effectiveness of local democratic governments is advanced whenever either of them can win from this Court a ruling which paralyzes the power of these officials."

On page 25 he said:

> "A trial court and jury has found only that in the context of violence and disorder in which it was made, this speech was a provocation to immediate breach of the peace and therefore cannot claim constitutional immunity from punishment. Under the Constitution as it has been understood and applied, at least until most recently, the State was within its powers in taking this action.

And on page 25 he further said:

> "Rioting is a substantive evil, which I take it no one will deny that the State and the City have the right to punish."

On page 27 quoting from Cantwell v. Connecticut, 310 U. S. 296, 309-310. In the latter case Mr. Justice Roberts for a unanimous court said:

> "The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace or order appears the power of the State to prevent or punish is obvious. 310 U. S. 296, 298.
>
> How this present decision, denying state power to punish civilly one who precipitated a public riot involving hundreds of fanatic fighters in a most violent melee can be squared with these unanimous statements of law is incomprehensible to me."

On page 28:

> "However, these wholesome principles are abandoned today and in their place is substituted a dogma of absolute freedom for irresponsible and provocative utterances which almost completely sterilizes the power of local authorities to keep the peace as against this kind of tactics."

On page 29:

"The Constitution of Illinois is representative of the provisions put in nearly all state constitutions and reads (Art. II, Sec. 4). 'Every person may freely speak, write and publish on all subjects *being responsible for the abuse of that liberty*' That is what I think is meant by the cryptic phase 'freedom of speech' as used in the Federal Compact, and that is the rule I think we should apply to the states." (Italics ours.)

On page 31:

"I do not think we should carry this handicap further, as we do today, but should adhere to the principles heretofore announced to safeguard our liberties against abuse as well as against invasion. * * * But if free speech is to be a practical reality, affirmative and immediate protection is required; and it can come only from non judicial sources. It depends on local police, maintained by law abiding taxpayers and who, regardless of their own feelings, risk themselves to maintain supremacy of law."

On page 33:

"Because a subject is legally arguable, however does not mean that public sentiment will be patient of its advocacy at all times and in all manners—hence many speeches, such as that of Terminiello, may be legally permissible but may nevertheless in some surroundings be a menace to peace and order. When conditions show the speaker that this is the case, as it did here, there certainly comes a point beyond which he cannot indulge in provocations to violence without being answerable to society."

On page 34:

"When the right of society to freedom from probable violence should prevail over the right of an individual to defy opposing opinion, presents a problem that always tests wisdom and often calls for immediate and vigorous action to preserve public order and safety.

"I do not think that the Constitution of the United States denies to the states and the municipalities power to solve the problem in the light of local conditions, at least so long as danger to public order is not invoked in bad faith, as a cover for censorship or suppression. The preamble declares domestic tranquility as well as liberty to be an object in founding a Federal Government and I do not think the Forefathers were naive in believing both can be fostered by law."

On page 37:

"In the long run maintenance of free speech will be more endangered if the population can have no protection from the abuses that lead to violence. No liberty is made more secure by holding that its abuses are inseparable from its enjoyment. We must not forget that it is the free democratic communities that ask us to trust them to maintain peace with liberty and that the factions engaged in this battle are not interested permanently in either.

"This Court has gone far toward accepting the doctrine that civil liberty means the removal of all restraints from these crowds and that all local attempts to maintain order are impairments of the liberty of action. The choice is not between order

and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."

From the United States Law Weekly, page 3021 appears the following:

"The Chicago conviction of Father Terminiello for an inflammatory speech was set aside because of an erroneous charge to the jury. *The Court avoided the basic problems of free speech which had been argued to it* and held that the charge to the jury saying the Chicago ordinances permitted a conviction if the speech stirred people to anger, invited public dispute or brought about a condition of unrest and construed the state statute in a manner which violated Terminiello's constitutional right of free speech." (Italics ours.)

Schneider v. State (Town of Irvington) 308 U. S. 147.

This case dealt with the abridgment of the freedom of those rightfully on the street to impart information through speech or the distribution of literature, under the guise that the restriction was to keep the streets clean and a censorship on the distribution of circulars from house to house. It was one of four cases before the court all of which dealt with the restriction on the distribution of literature. Here there was an absolute prohibition that was declared unconstitutional.

Here there was *complete previous restraint* but no disorder. The comment on the importance of preventing restrictions, viewed from the facts of the case, are highly proper but there is no parallel to the within case. In the Feiner case there was no previous restraint of any nature or absolute prohibition.

Jamison v. Texas, 318 U. S. 413.

> In this case the appellant, a member of Jehovah Witnesses, was charged with the distribution of handbills on the streets of Dallas, Texas, in violation of an ordinance of that city that prohibited their distribution. The distribution was quietly done and without any disorder. The City claimed an absolute right to prohibit the use of the streets for the communication of ideas. This Dallas ordinance forbade the expression of views in an orderly fashion.

Here there was an absolute prohibition and the court rightfully held the ordinance to be unconstitutional.

There is not the slightest parallel between the Jamison Case and the within case. There previous restraint and outright prohibition existed; Feiner had his right and exercised it to the extent of abuse.

Schenck v. United States, 249 U. S. 47.

Mr. Justice Holmes, on page 52, says:

> "We admit that in many places and in ordinary

times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends on the circumstances in which it is done. Aikens vs. Wisconsin, 195 U. S. 194, 205, 206. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic * * *

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that will bring about the substantive evils that Congress has a right to prevent."

The people contend that in the Feiner case a substanive evil, not national in scope but of vital local importance could easily have resulted had the officers not checked it before it broke out into actual disorder.

Sellers, et. al. v. Johnson, et. al. 163 F. 2d 877
Circuit Court of Appeals, Eighth Circuit.

This case holds that the fundamental rights to assemble, to speak, and to worship cannot be abridged merely because persons threaten to state a riot or because peace officers believe or are afraid that breaches of the peace will occur if the rights are recognized. Here it was argued that the proposed religious meetings were prevented and the members of the sect were denied the use of the park in the Town of Lacona, Iowa. The Town Council passed resolutions denying such use by the Jehovah's Witnesses and

meetings were prohibited and the members were denied the use of the park. It was held that such action was a violation of the constitutional rights of Jehovah's Witnesses.

There was here a most decided and determined effort to previously restrain the Jehovah's Witness and they were pre-judged before they even assembled or spoke. There is no similiarity to the within case where there was no previous restraint, where the speaker exercised his rights of freedom of speech and of assembly and was checked only when his abuse of the rights treafened a breach of the peace.

Lovel vs. Griffin, 303 U. S. 44.

This was an appeal from the Court of Appeals of Georgia under a municipal ordinance forbidding as a nuisance the distribution by hand or otherwise of literature of any kind without first obtaining a written permission from the City Manager. It was held that the ordinance violated the Fourteenth Amendment in that it struck, as the Court said, at the very foundation of the freedom of the press by subjecting it to a license and censorship. The Court placed the distribution of pamplets and leaflets in the same category as newspapers and periodicals.

Here quite apparently, the ordinance was unconstitutional on its face. The comments by the Court in this case as to freedom of speech are not open to any adverse comment but clearly there is no similarity to the facts in the within case where there is no question as to the constitutionality of the section of the Penal Law of the State of New York under which the defendant Feiner was convicted.

Here in the Feiner case there was no previous restraint, no prohibition on his speaking, only the abuse was checked.

Hague, Mayor, et. al. v. Committee of Industrial Organization, 307 U. S. 496.

This case was before the Court in respect of the asserted privilege and immunity of citizens of the United States to advocate action pursuant to federal statute by distribution of printed matter and oral discussion in peaceable assembly; and the jurisdiction of Federal Courts of suits to restrain the abridgment of such privilege and immunity, and refuse the use of the streets and parks for communication of views on national questions.

In this case there was a denial of the right to hold public meetings and distribute literature. There was a deliberate policy of prevention; there was no breach of the peace and no threatened breach of the peace. The whole issue was whether freedom to disseminate information concerning the purpose of the National Labor Relations Act to assemble peaceably for the discussion of the act and advantages offered by it is a privilege or immunity of a citizen of the United States secured against State abridgment. It also gave the Directory of Public Safety the right to refuse a permit on his mere opinion that such refusal would prevent riots, disturbances or disorderly assemblages—a clear case of previous restraint not present in the Feiner case.

Here the ordinance was declared unconstitutional but the right of regulation was recognized by the Court. Feiner was never denied the use of the street or the free-

dom to express himself. Only the resultant reaction of the crowd to his speech, tending toward a breach of the pease was regulated. There is no parallel to the Feiner case.

Thomas v. Collins, Sheriff, 323 U. S. 516.

This case was before the court on the constitutionality of a Texas Statute that required paid labor union organizers to register with the Secretary of State of the State of Texas and secure an organizers card before soliciting members within the State as applied to a national labor leader who was invited to Texas to address a mass meeting and who in giving a prepared speech invited one person specifically and all hearers generally to join the union and who neither asked nor accepted funds or property for the union at the time of the address or while he was in Texas.

It was held that this statute contravened the First Amendment in abridging free speech and freedom of assembly. In its decision the court made commendable pronouncements on the right of free speech and free assembly, but nothing in the case in any way approaches the issue in the within case of actions and words tending to a breach of the peace.

Thornhill vs. Alabama, 310 U. S. 88.

This case was before the United States Supreme Court on petition of one Byron Thornhill who had been convicted of a violation of Section 3448 of the State Code of 1923 which forbade loitering and picketing. The petitioner was

found guilty after trial without a jury of Loitering and Picketing as charged in the complaint. The employees of Brown Wood Preserving Company had been on strike and Thornhill had requested one man not to go to work. He was arrested, charged and convicted. He petitioned the Supreme Court of the United States to review the conviction on the grounds that the ordinance or section of the code under which he was convicted was unconstitutional in that it was an abridgment of the right of free speech and free assembly. The Court so found.

But again there is no parallel. Thornhill made no remarks to incite a crowd, used no intemperate language nor was there, as there was in the Feiner case, even a threatened breach of the peace.

Murdock v. Pennsylvania, 319 U. S. 105.

This was a case in which the petitioners, members of Jehovah's Witnesses, were convicted and fined for violation of an ordinance of the City of Jeanette, Pennsylvania, in that they failed to procure from the Burgess a license to transact business but went from house to house selling religious tracts and seeking contributions.

There is nothing in this case in any sense in point with the within appeal. In this case there was previous restraint but nothing of any nature tending to a breach of the peace. In the Feiner case there was no previous restraint, he exercised his privilege of freedom of speech and assembly and was restrained only when after thirty minutes his words and their effect on the assembled crowd threatened a breach of the peace.

Board of Education vs. Barnett, 319 U. S. 624.

This was a case involving the refusal of a religous sect to salute the American Flag as violative of their religious views. Their right to so refuse was upheld by this court.

This case likewise is in no sense a case arguable to the issue in the within appeal. Compulsion to do something against one's religious scruples is a thing entirely different from the abuse of a right freely exercised with no previous restraint.

DeJonge vs. Oregon, 229 U. S. 353, 364.

This was a case under the criminal syndicatism law of the State of Oregon. The Defendant, DeJonge, was tried, convicted and sentenced for merely participating at a meeting, otherwise orderly, because the meeting was held under the auspices of the Communist Party.

There is no parallel to the within case against Feiner. In the DeJonge case there was no disorder or breach of the peace. There was in the DeJonge case a very definite curtailment of the freedom of speech and assembly that was never denied to the petitioner Feiner.

Mr. Chief Justice Hughes, on page 364, in reversing the judgment of conviction, says in reference to the rights of free speech and free assembly:

> "These rights may be abused by using speech, press or assembly in order to incite to violence and crime. The People through their legislatures may

protect themselves against the abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed."

It is respectfully submitted that in the Feiner case the People were protecting themselves against the abuse by the exercise of the police power granted through the enactment by the legislature of the section of the Penal Law of the State of New York under which he was convicted. His rights did not extend to the abuse of the freedom, the right itself was not curtailed, only the abuse of the right. That curtailment was necessary to the preservation of the right itself.

Marsh v. Alabama, 326 U. S. 501.

This case holds, and rightfully so, that a state cannot consistently with freedom of religion and the press, guaranteed by the First and Fourteenth Amendments, impose criminal punishment on a person for distributing religious literature on the sidewalk of a company owned town, contrary to regulations of the town's management where the town and the shopping district are freely accessible to and freely used by the people in general even though the punishment is attempted under a state statute making it a criminal thing for anyone to enter or remain on the premises of another after having been warned not to do so. Here there was distribution on private property, the distributor asked for a permit and was refused. Mr. Justice Black in his opinion held that an ordinance con-

pletely prohibiting the dissemination of ideas on the city streets cannot be justified on the ground that the municipality holds title to them. Here a distinction was attempted between the ordinary municipality and company owned towns.

Here again there was an absolute prohibition, a previous restraint, and no disorder or threatened disorder. There is no parallel with the Feiner case where there was no previous restraint and where his remarks caused a threatened breach of the peace while he enjoyed freedom of assembly and of speech.

Connelly vs. General Construction Co., 269 U. S. 385.

This case holds that a criminal statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application lacks the first essential of due process. Oklahoma Compensation Statute, Sections 7255, 7257, imposing severe cummulative punishments upon contractors with the State who pay their workmen less than the current rate of per diem wages in the locality where the work is performed was held void for uncertainty. In this case Mr. Justice Sutherland held that a criminal statute cannot rest on uncertain foundation "The crime and the elements constituting it must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is unlawful for him to pursue." Penal statutes providing the doing of cer-

tain things and providing a punishment for their violation should not admit of such a double meaning that the citizen may act upon the one conception of its requirement and the court upon another.

The decision in the Connelly case is good law but wholly inapplicable in the present case. There is nothing vague or uncertain about Section 722 of the Penal Law of the State of New York. It is submitted that the petitioner, a man above common intelligence, should and did know what the effects of his speech on the crowd would be and was. He was speaking vehemently, in what his attorney sets forth in his own brief, at a protest meeting to protest and criticize the cancellation of authorization previously granted one John Rogge to speak at a public high school. There is no evidence in the record as to why the cancellation was made nor is there an iota of evidence that the cancellation was a threat to civil liberties. The speaker went to the section of the city where he spoke. He went there to do a job and whip up an audience for the meeting to follow. Before he spoke he was decided in his own mind that his civil liberties had been abridged and with this mental attitude he spoke and spoke for a purpose and he knew and dealt in abusive language, he knew he was offensive to others, he disobeyed police instruction. The sections under which he was charged and convicted certainly bear no resemblance in uncertainty to the Oklahoma Compensation Statute. It doesn't take any guess work to understand disorderly conduct. The elements of the offense of Disorderly Conduct are set forth in strikingly intelligible detail; there is not the slightest danger of reading any double meaning into its clear precise wording. This Section of the New York Penal Law has been the clear standard of preservation of order in the State of New York

for scores of years, it was there before the petitioner. Had he read it he would have known it. If he didn't know it his ignorance is no excuse. Had he been furnished with a copy of it or had it been called to his attention he would likely then complain of previous restraint. The trouble is not with the statute but with the petitioner who was indifferent to it.

United States v. L. Cohen Grocery Company, 225 U. S. 81.

This case is one where Chief Justice White rendered an opinion declaring the unconstitutionality of Section 4 of the Food Control Act of August 10, 1917, as amended on October 22, 1919, in denouncing and attaching a penalty of fine or imprisonment to the making by any person of any unjust or unreasonable rule or charge in handling or dealing in or with any necessaries holding that this must be construed as forbidding and penalizing the exaction of any excessive price upon the sale of the commodity.

There might be vagueness or doubt as to what is an unreasonable charge in a commercial transaction but there is no vagueness in the statute herein except an asserted vagueness in the hopes of bringing the within case within the purview of the above referred to decision.

Lanzetta v. New Jersey 306 U. S. 451.

This was a case where a statute of New Jersey penalized "Gangsters" and "membership" in a

"gang" and the statute failed to indicate what constitutes "membership" or how one may join a "gang". The court held that a statute penalizing gangsters and declaring that "any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons who has been convicted at least three times of being a disorderly person or who has been convicted of any crime is a "gangster" is so vague and uncertain in its definition of the offense as to be repugnant to the due process clause of the Fourteenth Amendment.

This case bears no parallel to the within issue. The court based its decision on the vagueness of "membership", "gang", "gangster", but never referred to Disorderly Person for under all jurisdictions what constitutes a Disorderly Person or Disorderly Conduct has been well defined and has a definite and certain meaning to the layman as well as to the courts.

Stromberg v. California, 283 U. S. 359.

The appellant was charged under the California Penal Code, Section 403, which condemns displaying a red flag in a public place or in a meeting place as: A-as a sign, symbol or emblem of opposition to organized government.
B-as an invitation or stimulus to anarchistic action.
C-as an aid to propaganda that is of a seditious nature.

There was a general verdict it being impossible to tell under which clause convicted, the court holding that if any clause was invalid then the conviction could not stand.

Here again there is no parallel to the Feiner case. Such vagueness should be overruled as in the other similar cases but the mere citing of cases where the constitutionality of a statute has been subject to attack for vagueness doesn't read the same defect into another statute merely by the mere assertion and without any showing to back up the assertion.[6] Counsel has failed totally to show in Section 722 of the Penal Law of New York the vagueness that might even raise a question under the cases on vagueness recited in his brief.

M. Kraus & Bros. v. U. S., 327 U. S. 614.

In order to sustain a criminal conviction, regulations prescribed by the Price Administrator under Section 2 (g) of the Emergency Price Control Act to prevent circumvention or evasions of price limitations must be explicit and unambiguous and must adequately inform those who are subject to their terms, what conduct will be considered evasive, the dividing line between unlawful evasion and lawful motion cannot be left to conjecture.

This decision arose out of certain price controls established for the poultry business and combination sales of skin, feet and the chicken itself. There were fixed prices on some parts and none on others, certain dealers insisted on certain poundage of the

less desirable parts of the chicken as a condition to the more desirable portions. Here were involved provisions to prevent circumvention in a highly competitive business practiced in a cutthroat manner that demanded the regulations be definite and certain.

There is no similarity to the present case. The average member of the community observing the current morality as referred to in the People v. Yergan above doesn't need a book of technical rules to guide him in his daily conduct to observe the peace of the community that society demands.

Herendon v. Lowry, 301 U. S. 242.

This was an appeal from the Supreme Court of the State of Georgia. This case holds that a State statute punishing as a crime the acts of soliciting membership for a political party and conducting meetings of a local unit of that party where one of the doctrines of the party established by reference to a document, not shown to have been exhibited to any one by the accused, may be said to be ultimate resort to the violence in the indefinite future, against organized government, unwarrantably invades the liberty of free speech and so violates the Fourteenth Amendment.

Mr. Justice Roberts on page 258 says:

"That power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a

definite character must find its justification in a reasonable apprehension of danger to organized government. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond that need violates the constitution."

Mr. Justice Roberts on page 256 said:

"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that will bring about the substantive evils that Congress has a right to prevent."

Here was a case where a conviction was had more on the policies and aims of the organization than on individual acts done. This case is not decisive of the problem in the within case. In the Feiner case there was no question of a resort to violence in the indefinite future. There was a then present issue of immediate pending disorder; there wasn't any danger to organized government but there was an immediate danger of a breach of the peace. The peace and quiet of that community where the speech was being made was then being threatened. A breach of the peace in that particular community would have been such a substantive evil locally as the State Legislature had a right to seek to prevent by the provisions of Section 722 of our Penal Law.

Saia v. New York, 334 U. S. 558

This case holds that a city ordinance forbidding the use of a sound amplification device in pub-

lic places except with the permission of the Chief of Police and prescribing no standards for the exercise of his discretion is unconstitutional on its face since it establishes a previous restraint on the right of free speech in violation of the First Amendment.

As to the use of a loud speaker in the instant case the attention of the court is called to the fact that the use of such a device was never a factor in the trial in the Syracuse, New York, Court of Special Sessions, only insofar as counsel for the petitioner tried to infuse it into the trial. Its mention in the information as referred to was merely incidental. He never was the defendant in a charge wherein the use of a loud speaker in violation of an ordinance was charged.

On page 71 of the record Judge Bamerick conceded that the use of such a device "in and of itself is perfectly proper" and again on page 138 of the record the court said "Now there is no question about the right of any citizen, including yourself to use a sound truck for the purpose of delivering an address, and I have no dispute or difference with any of the decisions of the United States Supreme Court or any court on that subject. You had a perfect right to appear there and to use that implement, the loud speaker. You had a right to have it on the street. There is no question about that." What could be clearer than that? Judge Bamerick never considered the use of the loud speaker as an element in the charge or as a factor in his finding the petitioner guilty.

Winters v. New York, 333 U. S. 507

This case was before this court on a construction of Subdivision 2 Section 1411 of the New York Penal Code and as construed by the Court of Appeals to the effect of prohibiting the distribution of a magazine principally made up of news stories of criminal deeds of bloodshed or lust so massed as to become vehicles for inciting violent and depraved crimes against the person was held to be so vague and indefinite as to violate the Fourteenth Amendment by prohibiting acts within the protection of the guaranty of free speech and press.

A vague statute should be declared unconstitutional but it is again submitted that there is no comparable analogy between the definiteness that should accompany such restrictions so that a distributor would know what type he could dispose of and what type he couldn't distribute and a knowledge of what constituted a breach of the peace. It is no more possible to enumerate the acts that promote disorder and breach of the peace than it is to list the acts and attributes that spell out good behavior and law abiding conduct. This bid to read vagueness into the Disorderly Conduct statute has no merit.

The use of a loud speaker was never an issue in the trial of the defendant's case in the Court of Special Sessions of the City of Syracuse and his conviction in that Court.

The mention of a loud speaker in a bill of particulars is as far as the use of a loud speaker ever was considered

by the People. Its use was not questioned at the trial other than by the defendant's counsel and the legality of its use was conceded by the prosecution and the trial judge. Its use was never a factor in the judge of the court in arriving at his findings of guilty. Its use was definitely referred to by the judge as being strictly within the defendant's legal rights.

In a motion made by the attorney for the petitioner prior to the trial in Syracuse, New York, Court of Special Sessions, he made much of the reference to a loud speaker by reason of the fact that its use was mentioned in an information and tried to spell out a charge as to its use as such. It will be observed that in deciding and denying the motion the judge of that court made clear the petitioner's right to use such a device, an attitude toward its use that he took and maintained throughout the trial and in his decision specifically ruled out such use as being in any sense the basis of his finding of the petitioner guilty.

CONCLUSION

THE WRIT OF CERTIORARI SHOULD BE DENIED.

Petitioner has not made any showing to substantiate his assertions that the New York State Court of Appeals, in their decision, in any way rendered the same in conflict with any controlling Federal decisions applicable to the within facts. The arguments advanced by counsel are not based on the facts as actually found and the decisions cited are not applicable to the true facts. No abridgment of the freedom of speech or freedom of assembly, the

basis of the within review, is involved or has any such abridgment been shown. The decisions of the Syracuse, New York, Court of Special Sessions, the County Court of the County of Onondaga, New York, and the Court of Appeals of the State of New York were in each instance made in consonance with and with full regard and consideration of the petitioner's constitutional rights. No conflict exists between these decisions and any decision of this high court applicable to facts similar to those herein. The Writ of Ceriorari should be denied and for the reasons above and herein stated the judgment of the court below should be affirmed.

Respectfully submitted,

JESSE E. CANTOR,
District Attorney

By DAN J. KELLY,
Assistant District Attorney
Office & P. O. Address
409 Court House
Syracuse, New York

OPINION OF JUDGE LEO W. BREED
(Not reported)

COUNTY COURT—County of Onondaga.

The People of the State of New York
Respondent.

-vs-

Irving Feiner,
Appellant.

APPEARANCES::

Sidney Greenberg, Esq., Attorney for Appellant.

Dan J. Kelly, Esq., Assistant District Attorney of the County of Onondaga, Attorney for Respondent.

BREED, J.

This is an appeal from a judgment convicting the appellant of a violation of Section 722 of the Penal Law of the State of New York in the Court of Special Sessions of the City of Syracuse. The appeal is taken upon the following grounds: 1. That the People did not prove beyond a reasonable doubt that the defendant committed the acts charged; 2. That the conviction of the defendant was invalid as an abridgment of the freedom of speech and of assembly guaranteed by the First and Fourteenth Amendments of the Federal Constitution and Article 1, Section 8 of the State Constitution; and 3. That the sentence of the Court was excessive. Section 722 of the Penal Law reads in part as follows:

"Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct;

1. Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior;

2. Acts in such manner as to annoy, disturb, interfere with, obstruct or be offensive to others;

3. Congregates with others on a public street and refuses to move on when ordered by the police."

The test in each case is whether defendant's conduct, under all the circumstances led to or was likely to lead to disorder or public disturbance. People v. Vogt, 178 Misc. 446 People vs. Bellows, 281 N. Y. 67.

It has been held that it is not essential that there be an actural breach of the peace. Of course, where there is no breach of the peace, there must be proof of circumstances which would form a logical basis for the opinion that the conduct tends to a breach of the peace. People vs. Sadowsky, 149 Misc. 583. People vs. Galpern, 259 N. Y. 279. After reviewing the evidence in this case I conculde that there was sufficient evidence to show that the appellant's deportment was offensive and insulting, that it caused a crowd of about seventy-five people to gether upon the street and sidewalk; that it impeded pedestrians desiring to use the sidewalk; that the crowd showed evidence of unrest and some of them threatened violence to such an extent that the officer came to the conclusion that if it continued, disorder would result The police apparently, in order to maintain peace and prevent disorder in the neighborhood, asked the appellant to desist and when his order was disobeyed he made the arrest.

From the evidence in this case I feel that the officer was justified in drawing the conclusion that unless the appellant desisted in his talk that disorder and violence would result. Police officers are guardians of the public order. It is their duty to prevent disorder in the community and as such they may give reasonable directions. In this case the police officer asked the appellant to stop talking, apparently in an effort to prevent disorder. This the appellant did not do but persisted in the continuance of his talk and the arrest followed. In my opinion the evidence was sufficient to support a finding that the appellant was guilty of the offense charged. People vs. Nixon, 248 N. Y. 182.

Upon the argument of the appeal the appellant laid great stress upon his constitutional right of freedom of speech. There is no doubt but that the right of free speech is guaranteed by the Federal and State Constitutions, but our Courts have held that the constitutional right of freedom of speech is not absolute, but is subject to such reasonable regulations as are necessary to promote and preserve the public peace. In Whitney vs. California 274 U. S. 357, the Court said:

> "That the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom; and that a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threa-

ten its overthrow by unlawful means, is not open to question Gitlow vs. New York, 268 U. S. 562, 666-668, and cases cited."

Likewise, in the case of Cantwell vs. Connecticut, 310 U. S. 296, the Court, in its discussion of the question, said:

"The offense known as breach of the peace embraces a great variety of conduct destroying or menancing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets or other immediate threat to public safety, peace or order appears, the power of the State to prevent or punish is obvious."

Under the circumstances, I do not feel that the constitutional rights of the appellant have been violated.

As to the third ground raised by the appellant, that the sentence of the Court was excessive, the law provides that the offense of disorderly conduct is punishable for a term of imprisonment not exceeding six months or by a fine not exceeding Fifty Dollars, or by both such fine and imprisonment. The sentence in this case was 30 days in the Onondaga County Penitentiary. I cannot say that the sentence imposed was excessive. The Judgment of conviction and sentence imposed thereunder is therefore affirmed, and it appearing from the records of this Court that the appellant was released on bail pending the outcome of this appeal, it is

ORDERED that the appellant present himself in person before this Court on August 17th, 1949, at 10:00 o'clock in the forenoon to render himself in execution of the judgment.
Dated at Syracuse, N. Y.
August 5th, 1949.

LEO W. BREED
Onondaga County Judge

OPINION OF THE NEW YORK STATE COURT OF APPEALS

The People of the State of New York
Respondent.

-vs-

Irving Feiner,
Appellant.

Decided March 2, 1950

APPEAL, by permission of an Associate Judge of the Court of Appeals, from a judgment of the Onondaga County Court, entered August 8, 1949, which affirmed a judgment of the Court of Special Sessions of the City of Syracuse (Bamerick, J.), convicting defendant of disorderly conduct in violation of subdivision 2 of section 722 of the Penal Law.

SIDNEY H. GREENBERG for appellant.

REUBEN T. URETSKY for New York State Civil Rights Congress, amious curiae, in support of appellant's position.

JESSE E. CANTOR, District Attorney (Dan J. Kelly of counsel, for respondent.

CONWAY, J. Defendant was convicted of the offense of disorderly conduct (Penal Law, Sec. 722) in the Court of

Special Sessions of the City of Syracuse. The conviction was affirmed by the Onondaga County Court and the case is here by permission of a Judge of this court.

On the evening of March 8, 1949, defendant, Irving Feiner, a student at Syracuse University, was addressing a group of people on South McBride Street, near Harrison Street, in the City of Syracuse. A complaint concerning the gathering was received over the telephone by the police department and two officers, Flynn and Cook, were dispatched to the scene to investigate. That was about 6:30 P. M. Officer Flynn, an acting sergeant, arrived in a police car about twelve or thirteen minutes later and found officer Cook already there in another police car. They observed a crowd of approximately seventy-five or eighty people, both colored and white, gathered near defendant, who was standing on a large wooden box, situated between the sidewalk and a parked automobile on South McBride Street. The automobile was about forty or forty-five feet from the corner and the crowd extended to about twenty or twenty-five feet from the corner. The crowd covered an area of about fourteen by thirty-five feet.

Defendant was speaking into a hand microphone which was attached to loud-speakers on the automobile. Between five and ten associates of defendant were present. They distributed circulars and helped set up the sound amplification apparatus. Defendant was exhorting his listeners to attend a meeting to be held that night in the Syracuse Hotel. In the course of his remarks, defendant "called Mayor Costello (of Syracuse) a champagne (sic) sipping bum and President Truman a bum. He referred to the American Legion as Nazi Gestapo agents — he also said the fifteenth Ward was run by corrupt politicians and that horse rooms were operating."

The crowd gathered by the defendant filled the space between the curb and the building line on the sidewalk. Pedestrians, trying to use the sidewalk, were forced to step out to walk in the street. Some of the crowd spread out into the street, and, since traffic was passing at the time, the officers attempted to get the people back on the sidewalk. As officer Cook approached the scene earlier in the police car, he "had to slow down pretty near to a stop at that point" because of the pedestrians in the street.

Officer Flynn further observed that there was "angry muttering" throughout the crowd and he had trouble getting through it. The crowd was restless. There was some pushing and shoving. They were milling around back and forth. Remarks were being made in the audience both for and against the speaker. "Some were calm and some were not—they were discussing the speech pro and con." There was however, no disorder. After telephoning the police station from a nearby store, Flynn returned to the police cars with Cook and then they crossed the street and mingled with the crowd.

Defendant was speaking in a loud, high-pitched voice and was appealing to the colored people in particular. Defendant said that the negro people did not have equal rights and that they should rise up in arms and fight for them. Flynn got the "impression" that defendant was trying to arouse the Negro people against the whites. Defendant's statement that the Negro people should rise up in arms and fight "stirred up a little excitment" and the crowd "seemed to mill around a little then." One man approached the officers and said "if you don't get that 'son of a bitch' off, I will go over and get him off there myself." Other persons made remarks about the police force not being able to handle the

crowd and that "they did not see why they had to put up with that kind of stuff in the neighborhood."

At this point, Flynn "figured it had gone far enough". The crowd was "getting to the point where they would be unruly." Although there had been no actual disturbance, Flynn said, "we stepped in to prevent it from resulting in a fight." Flynn approached the defendant, not for the purpose of arresting him, but to get him to break up the congregation. He asked defendant to get down off the box but the latter "just looked, and kept right on talking to the crowd." Flynn waited a minute and then demanded that he get down, but defendant still refused. The crowd, which was not quiet, was pressing closer around defendant and the officer. Finally, Flynn told defendant he was under arrest and reached up to grab him. Defendant stepped down off the box and announced over the microphone that "The law has arrived, and I suppose they will take over now." In all, Flynn had asked defendant to get down three times over a space of four or five minutes. Officer Flynn had been present at the scene about fifteen or twenty minutes and Cook about twenty-five or thirty minutes. Defendant, of course, had been speaking for some time longer than a half hour.

On his case, in addition to character witnesses from the faculty of Syracuse University, defendant introduced evidence controverting the officers' testimony concerning the size and temperament of the crowd, the degree of obstruction of the sidewalk and street, the substance of the talk, and defendant's response to the officer's request. Portions of this testimony corroborated elements of the People's case; portions were not believed by the Trial Judge.

On the evidence, the Special Sessions Judge found defendant guilty of disorderly conduct under section 722 of

the Penal Law. In section 722, the Legislature has enumerated certain acts which, if committed with intent to provoke a breach of the peace, or which, even without such intent, may reasonably occasion a breach of the peace, render the actor guilty of disorderly conduct. The section provides in part as follows:

"Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

"1. Uses offensive, disorderly threatening, abusive or insulting language, conduct or behavior;

"2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;

"3. Congregates with others on a public street and refuses to move on when ordered by the police;"

Defendant was charged with and found guilty of a violation of subdivision 2 of section 722, but it is settled that the judgment of conviction in a case such at this will be affirmed if the evidence establishes a violation of any of the subdivisions of the section. (People vs. Hipple, 263 N. Y. 242, 244.)

In finding the defendant guilty, the court, in an oral decision addressed to defendant, said: *** You had a perfect right to appear there and to use that implement, the loud speaker. You had a right to have it in the street. There is no question about that. ***" The court further assumed that defendant had a legal right to refer to Mayor Costello and O'Dwyer, President Truman and the American Legion in abusive and disrespectful terms. The Trial Judge then reviewed the evidence pointing out the size of the crowd gathered by defendant, the blocking of the sidewalk, the neces-

sity for pedestrians to walk out on the roadway and the unrest and hostility engendered in a portion of the crowd. He continued:

"Now, under those circumstances I think the officers were fully justified in feeling that a situation was developing which could very, very easily result in a serious disorder. I think the officers were very patient up to that time. I think on the basis of the evidence here that you deliberately agitated and that in every way that you could, you goaded these officers to action. ***

"***I think they (the police officers) had every reason in the world to believe, on the basis of the facts that they have testified to, that something serious was about to happen. And then the Officer asked you to get down off the box, and he asked you again, and then one of the officers says he took you by the arm or reached for you. Three times you had to be requested to get off the box. I think that all those facts that have been testified to here are sufficient to sustain the charge of Disorderly Conduct. ***

"I find on the facts that you are guilty as charged in the Information and Warrant."

The findings contained in the decision of the Trial Judge sufficiently establish that defendant, under section 722 and our cases construing it, was guilty of disorderly conduct — putting aside, for the moment, constitutional objections to the conviction.

The statement made by the Trial Judge to defendant that "on the basis of the evdence here *** you deliberately agitated and *** in every way that you could, you goaded these officers to action" was clearly a finding that defendant, by his conduct under the circumstances, intended to provoke a breach of the peace. Certainly defendant acted "in such

a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others", within the meaning of subdivision 2 and such conduct, in conjunction with an intent to provoke a breach of the peace is sufficient in itself to establish the offense of disorderly conduct. The defendant's conduct, at the very least, was such that it tended to disturb the public peace and quit and to occasion a breach of the peace. That under our cases, is sufficient. (People v. Nixon, 248 N. Y. 182-188-189; People v. Galpern, 259 N. Y. 279, 281-282, 284-285; People v. Hipple, supra; People v. Monnier, 280 N. Y. 77, 78-79; People v. Edel 286 N. Y. 637.) It is clear, apart from constitutional objections, that defendant's refusal to accede to the requests of the police officer within the scope of his lawful authority justified defendant's arrest and subsequent conviction for disorderly conduct. (People v. Nixon, supra; People v. Galpern, supra.)

Defendant's main contention on this appeal is that his conviction of the offense of disorderly conduct violates the right of freedom of speech guaranteed by our Federal and State Constitutions. We assume that the constitutional question was properly raised below, even though defendant's attorney did not sepcifically move on the record to dismiss *on that ground*, for both courts below considered it.

It is perhaps laboring the obvious and oft-repeated to state that the constitutional guarantee of freedom of speech is not an absolute right to be indiscriminately exercised under all circumstances and conditions. Social welfare requires, in certain instances, reasonable regulation of freedom of speech which, unrestrained, would produce calamitous or undesirable results — not only for the locality and public order but also, in the long run, for the individual involved. The preservation of order and the prevention of

disturbance are of prime importance to the State. As was said in Cox v. New Hampshire 312 U. S. 569, 574 (Hughes, Ch. J.,): "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recongnition of social need. * * *"

In the instant case, we have a situation in which on a public street a portion of defendant's audience became enraged and aroused at his utterances. Others were sympathic and were present for the specific purpose of assisting and applauding the efforts of the defendant. The crowd became restless and potentially unruly. It filled the sidewalk and spilled out into the adjacent thoroughfare obstructing or impeding both pedestrain and vehicular traffic. An imminent danger of a breach of the peace, of a distrubance of public order; perhaps even of riot, was threatened. Defendant, at the very least, knew of the condition and was heedless of the potential evil consequences. More, as found by the trial court, he deliberately continued in a vein calculated to precipitate those consequences. We do not think, under those circumstances, that defendant had a constitutional right to disregard the police officer's words of warning with impunity and to continue to blare out his provocative utterances over loud-speakers to a milling, restless throng composed of hostile and sympathetic listeners. Where both

the audience and the speaker are inevitably proceeding toward an eruption of civil strife — where, indeed, both seem to be working up to a pitch where serious disorder might well be expected — the power and duty of the State to punish the speaker who refuses to desist after appropriate warning is clear.

Justice Roberts stated the relevant considerations well in Cantwell v. Connecticut (310 U. S. 296, 308) as follows: "The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility, it includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious. Equally obvious is it that a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions. ****"

In the instant case, there is no indication that the action of the police officer was taken as a subterfuge or excuse for suppression of defendant's views and opinions. The courts below have found, and we are bound by the finding, that the officer was motivated solely by a proper concern for the preservation of order and the protection of the general welfare, in the face of an actual interference with traffic and an imminently threatened disturbance of the peace of the community.

We are well aware of the caution with which the courts should proceed in these matters. The intolerance of a hostile audience may not, in the name of order, be permitted to silence unpopular opinions. (49 Col. L. Rev. 1118.) The Constitution does not discriminate between those whose ideas are popular and those whose views arouse opposition or dislike or hatred — guaranteeing the right of freedom of speech to the former and withholding it from the latter. We recognize, however, that the State must protect and preserve its existence, and, unfortunate as it may be, the hostility and intolerance of street audiences and the substantive evils which may flow therefrom, are practical facts of which the courts and the law enforcement officers of the State must take notice. Where as here, we have a combination of an aroused audience divided into hostile camps, an actual interference with traffic and a speaker who is deliberately agitating and goading the crowd and the police officers to action, we think a proper case has been made out, under our State and Federal Constitutions, for punishment.

Defendant's principal, but mistaken, reliance is upon the recently decided case of Terminiello v. Chicago (337 U. S. 1, 5). There the Supreme Court reversed the conviction of the defendant upon the ground that it might have been based upon certain instructions of the Trial Judge to the jury authorizing a verdict of guilty if defendant's speech stirred the people to anger, invited dispute or brought about a condition of unrest. It there appeared that the speech of Terminiello was delivered in a private hall or auditorium and not upon the public street. In the abstract, no one may disagree with the proposition that a person cannot constitutionally be convicted for doing no more than delivering a speech which stirs people to anger, invites dis-

pute or brings about a condition of unrest. That, however, is not the instant case. Here the defendant, as indicated above, disrupted pedestrian and vehicular traffice on the sidewalk and street, and, with intent to provoke a breach of the peace and with knowledge of the consequences, so inflamed and agitated a mixed audience of sympathizers and opponents that, in the judgment of the police officers present, a clear danger of disorder and violence was threatened. Defendant then deliberately refused to accede to the reasonable request of the officer, made within the lawful scope of his authority, that the defendant desist in the interest of public welfare and safety.

We conclude that defendant was properly convicted of the offense of disoredly conduct and that his conviction, under the circumstances, does not infringe upon his constitutional right to freedom of speech.

The judgment should be affirmed.

LOUGHRAN, CH. J., LEWIS, DESMOND, DYE, FULD AND FROESSEL, JJ., CONCUR.

Judgment affirmed.